Supreme Court, U.S.
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No. 98-939

In The

Supreme Court of the United States

October Term, 1998

DAVID KEENE LEAVITT, et al.,

Petitioners,

v.

JOHN WOODRUFF KESSEL,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Appeals Of West Virginia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Respondent respectfully prays that this Court deny petitioners' writ of certiorari to review final orders of the Supreme Court of Appeals of West Virginia.

STATEMENT

Your respondent, John Kessel, takes exception to the accuracy or lack of completeness of the statement of facts outlined by the petitioners. The West Virginia Supreme Court of Appeals in reviewing the sufficiency and soundness of the jury's verdict in this case was required to view the facts, together with all reasonable inferences which may be drawn therefrom, in the light most favorable to the respondent. Any party, seeking to challenge before this Court the sufficiency or validity of the jury's verdict below as subsequently affirmed, should also present the facts in this same manner. Petitioners fail to do this and in so failing have not accurately painted the portrait of this case or completed its story. While now it will be impossible within the permissible space limits of this response to set forth all of the relevant facts and inferences and to point out where such facts and inferences diverge from those alleged by the petitioners, hopefully respondent will be able to set forth enough facts below directly or through reference to other sources in order to more accurately complete the real story of this case.

Before turning to a discussion of the relevant historical and procedural facts of this action, several points should be noted. First, petitioners make inaccurate, illogical and/or unsupported statements of fact and predictions of future consequences of the decision of the West Virginia Supreme Court of Appeals in an effort to create negative feelings toward the fitness or entitlement of the respondent to be a parent and to attribute some ominous threat of purported national significance to this case in order to attempt to get this Court to "bite" on their petition. Petitioners "doth protest too much."

Petitioners suggest that respondent would somehow be an unfit parent or otherwise contend that he did not come forward to grasp his opportunity to be a parent because he initially upon learning of petitioner Anne Conaty's pregnancy discussed her option of abortion, did not provide support to her during her pregnancy, and attempted to discuss his wishes and rights with her instead of accepting her and her family's decision as final without question. Each of these attacks are without merit. Petitioners conveniently ignore that each of these allegations could have appropriately been addressed in respondent's inverse paternity action by the Circuit Court of Cabell County had Anne appeared or otherwise defended the action.

How can the fitness of a biological father to be a custodial parent ever be legitimately questioned merely because he had in the past acknowledged the mother's constitutional right to have an abortion as a permissible option? Amazingly, and hypocritically, petitioners acknowledge that upon learning of pregnancy every woman is faced with the option of having an abortion, raising the child or placing the child for adoption. Petitioners would not seek to criticize the fitness of any woman merely because she acknowledged the existence of such options or even considered them. Yet, they seek to condemn the respondent's fitness for such very reason. In any event, any conceivable negative connotation which might be permissible under the law due to the respondent raising the possibility of abortion must evaporate when the evidence of record establishes that respondent expressed his desire to raise the child together with Anne or alone if she did not wish to herself and consequently instituted a legal action prior to the child's birth in order to establish his paternity and to assert his custodial rights.

Similarly, how can John be criticized for not supporting Anne during her pregnancy (financially or emotionally) when she fled the State, went into hiding and received her medical and maternity care under an assumed name in order to keep the birth of their child and the child's subsequent whereabouts

from John? To argue as petitioners do that such should be considered a strike against John is completely ludicrous. Next, how can the petitioners note that the decisions facing unmarried couples when faced with an unexpected pregnancy are emotional and traumatic in nature, yet criticize John because he sought to discuss his desires and rights with Anne and on two such occasions was asked to terminate his discussion and depart respectively by a school janitor and by Anne's father and brother?

Petitioners then predict that the finding of liability against them and the significant amount of the compensatory and punitive damages awarded in this case may lead to an increase in unwed, expectant mothers making decisions contrary to the best interests of their children either by motivating some of them to have abortions instead of placing their children for adoption or by motivating others to choose to raise the children themselves instead of placing their children for adoption. Petitioners' arguments in this regard are completely unsupported by any evidence of record and constitute nothing more than unbridled and undeserved speculation.

There is a fundamental difference between one seeking to protect one's own rights and obtaining the assistance of others for that limited purpose versus one seeking to thwart, prevent or interfere through fraud or other artifice with another who is lawfully attempting to establish or protect his own rights and obtaining the assistance of others for that illegitimate purpose. Petitioners continue to ignore or misunderstand this critical, conceptual distinction. The decision of the West Virginia Supreme Court of Appeals in this case seeks to hold petitioners liable under the tort law of the State for conduct constituting the latter not for conduct constituting the former. A review of that Court's decision reveals not only a painstakingly in-depth examination of the existing law but readily demonstrates the Court's utmost respect for human life and the best interest of children tempered with a sincere desire to fairly balance those interests with the constitutional and natural rights of parents.

Second, petitioners continue to insist that they have been unjustly punished by the West Virginia judicial system for performing activities which were perfectly legal within the State of California. Petitioners fail to inform this Court, however, that the Court of Appeal of the State of California, while addressing the merits of petitioner Leavitt's collateral attack on the West Virginia judgment in this case, has expressly disagreed with the appropriateness and legality of the petitioners' actions under California law. More specifically, that Court stated:

> Even assuming, as defendant alleges, California does not recognize the tort of intentional interference with parental relations, and California law did not require plaintiff to be informed of the adoption placement, *that does not make defendant's actions lawful, moral, or just*. Lying under oath at his deposition, allowing the adoptive parents to file a false affidavit, and helping Conaty finalize an adoption despite the temporary injunction and paternity judgment *constituted such immoral, reprehensible, and dishonest behavior that we can perceive no reason why California would have a public policy precluding recovery based on these egregious facts. We reject defendant's description of the West Virginia judgment as unjust punishment* for protecting confidences held to be privileged by a California trial court. Without deciding whether the privilege applies, *we note defendant was responsible for affirmative misrepresentations that went far beyond simply asserting the attorney-client privilege*.

Kessel v. Leavitt, No. B108792 c/w B110750, Slip Op. at 23-25 (Ct. App. June 15, 1998) (emphases added; footnotes omitted); Res. App. 64-65.

Also, in regard to the issue of the propriety of the West Virginia Supreme Court of Appeals requiring petitioner Leavitt to post an appeal bond, petitioner fails to inform this Court that the California Court of Appeals also rejected his argument that the West Virginia Supreme Court of Appeals acted

without authority or otherwise unconstitutionally in requiring him to post an appeal bond. *Kessel v. Leavitt*, Slip Op. at 21-23; Res. App. 60-64.

I. The Underlying Action

Contrary to the facts as stated by the petitioners, this case did not arise simply from an arranged adoption, but from intentional tortious acts, omissions and statements calculated to deprive John Kessel of his son and to thwart and prevent him from establishing and protecting his rights as the infant's natural father. One thing is clear from the record of this case, John Kessel did everything legally possible to come forward and assert his rights to his son. Defendants did everything they could to prevent him from doing that. David Leavitt stated in letters to Brian Conaty, "I think it is important that they (John Kessel and his attorneys) be prevented from learning any more than they know already for another month if at all possible." Tr. 4310, PX 57. Petitioners' conspiracy was successful and prevented John Kessel from finding out the necessary information until it was too late. Tr. 370-371, 469-470.

Over a seven year period, John Kessel and Anne Conaty were engaged to be married twice. In October, 1990, a son was unexpectedly conceived in Cabell County, West Virginia. In a preconceived and premeditated plan and scheme entered into by the petitioners, the petitioner David Leavitt ultimately sent John Kessel's son to Alberta, Canada to prevent him from exercising his constitutional rights as an unwed father to at least notice and a hearing in a United States court before termination of all of his rights to his son. John Kessel's son is now over seven years old and he has never seen or spoken to him.

As part of this plan, in January, 1991, Anne suddenly left town. Petitioners contend that Anne left before contacting David Leavitt. The circumstantial evidence, however, points to the contact occurring before she left West Virginia. Tr. 2041-2042. David Leavitt's case file for Anne Conaty

included telephone charges which date back to February and March, 1991, and one which appears to date back to January of that year. Tr. 911, PX 4. David Leavitt admitted the first contact was in March, 1991. Tr. 190-191. This contradicted testimony of the Conaty defendants who claimed that the call came from North Carolina in April. Tr. 1870, 2043-2044. Mr. Leavitt counseled clients to follow this kind of procedure in avoiding birth fathers' attempts to come forward and assert their rights. As he told Mr. Schafferius, "move her around to get to the point where they will have a hell of a time catching up with her," as well as other cloak and daggerish conduct to avoid being served with court orders and such. Tr. 1541-1575, 1986, R. 2986, PX 92. As Mr. Leavitt told one witness, he knew how to get around the law. Tr. 687.

After Anne Conaty left town in January, 1991, she never returned until October, 1991, three months after the baby was born. She did, however, retain her residence in Huntington, West Virginia, and merely took leave of absence from her work. Tr. 195, PX 5. Soon after she left town, John Kessel hired attorneys to intervene on his behalf to assert his legal rights to his son. By May 1, 1991, Cheryl Eifert, John Kessel's lawyer, had already written to Anne's West Virginia lawyer, David Lockwood, asking about the baby's prenatal care and warning that he would take legal action, if necessary, to assert his rights to the child. Tr. 288, PX 8. More specifically, in addition to providing that the respondent desired that the child live either with one or both parents and reiterating his refusal to consent to adoption, the letter further provided that if petitioner Anne Conaty refused to either reconcile with plaintiff or take custody of the child herself, respondent wanted custody of the child. This was faxed to David Leavitt by petitioner Brian Conaty on May 21, 1991. Brian Conaty, a West Virginia lawyer, had agreed on behalf of petitioner to keep a close check on the courthouse for lawsuits. Tr. 212, PX 8. He advised petitioner Leavitt in his cover letter that "Lockwood did not respond to [Kessel's attorney's May 1 letter] as he did not want service of process on him of

any claim." He also informed Leavitt that he had checked the courthouse "again" and had found "[n]o suits or notice."

Plaintiff, having no response to his attorney's letters, filed an inverse paternity action on June 3, 1991, seeking to establish his paternity of the child and to obtain all rights and obligations flowing therefrom. On June 21, 1991, David Lockwood, Anne's West Virginia lawyer, faxed a copy of the summons and petition to establish paternity to David Leavitt, Tr. 241, PX 16, who subsequently on approximately July 1, 1991, faxed a copy of the petition to counsel for prospective adoptive parents in Oregon. On June 26, 1991, the Circuit Court of Cabell County issued an injunction prohibiting the adoption placement until after John Kessel's paternity could be established. Tr. 241, 750, PX 17, 80A. This injunction was served by publication before the baby was released to the adoptive couple, and it was also personally served on Anne's brother, Brian Conaty, at Anne's place of residence on June 28, 1991. Tr. 732, PX 73, Tr. 1232, PX 66, 67, R. 1210-1236, Tr. 662, 673-674. The jury found by special interrogatory that both Anne Conaty and David Leavitt had actual notice of the injunction before the baby was placed for adoption. Pet. App. 236a-37a.

Following the birth of the child, petitioners Dr. and Mrs. Conaty were served with subpoenas for their depositions, but allegedly on advice from petitioner Brian Conaty, failed to appear for their deposition. As a result of their failure to honor the subpoenas, the circuit court found them in contempt. When they subsequently did appear for their depositions, both denied having any knowledge of the adoptive placement of the child, the location of their daughter, petitioner Anne Conaty, or when she could be expected to return home to Huntington, West Virginia.

Due to the failure of Anne to appear or otherwise defend or contest the inverse paternity action, on October 3, 1991, the circuit court entered a default judgment declaring John to be the legally determined natural father of the child with all rights and obligations flowing therefrom. Subsequently, on

January 10, 1992, the circuit court ordered Anne to authorize the release of her legal and medical records in California. Nonetheless, she initially refused to sign the releases, however, upon then being confronted with possible contempt charges, she signed the releases adding the notation "under protest." When advised by John of the protest language, the circuit court again ordered her to sign the releases, this time without adding the protest notation. However, immediately upon signing the releases anew, Anne executed a renunciation of her authorizations and faxed it to Leavitt with the request that he forward the renunciation to Cedars-Sinai Hospital. The circuit court found Anne's actions to be in contempt of court and had to again order her to sign new releases.

Only upon then subsequently receiving Anne's medical records from California did John learn the whereabouts of the Canadian adoptive couple. Upon receiving such records, John, through Canadian counsel, on March 3, 1992, filed a statement of claim requesting guardianship and a paternity action in the Court of Queen's Bench of Alberta, Canada Judicial District of Calgary. On June 22, 1992, following a hearing, the Canadian trial court entered an order dated June 22, 1992, dismissing John's claims, finding his consent to be unnecessary, and granting the Canadian couple's adoption petition.

Although petitioner Leavitt claims that all he did in California was lawful, he essentially ignores California's law on fraudulent concealment and, as previously noted, fails to mention that the California Court of Appeals has disagreed with his conclusion as to the legality of his actions. Additionally, Leavitt personally selected the adoptive couple from Canada. Leavitt admitted that in a private placement the parent placing the child must personally select the adoptive parents according to California law. Tr. 174, 662, 2258. He also admitted that it would be unethical for him to cover up the names and information about the adoptive couple and not tell the natural mother information about the adoptive couple. Tr. 2266. Yet, that is what he did. Tr. 1587-1589. Petitioner also advised an Oregon lawyer not to notify John Kessel of a

proposed Oregon adoption. Tr. 222. Consequently, the Oregon adoption was cancelled. Tr. 223-224. He then phoned Canada on a weekend and arranged the adoption with the Canadian couple without a home study for the couple who was going to adopt this baby. Tr. 278, 297-299. Petitioner knew of the lawsuit, and without ever asking a West Virginia lawyer whether service was effective, he advised Anne Conaty to not pay any attention to it. Tr. 391. With all of the knowledge of John Kessel's letters, the court action in West Virginia, the injunction and the rights of a determined father, petitioner forwarded all of the information to Canada and requested or suggested that the adoption should be expedited and completed as soon as possible. PX 52, 473. Indeed, Leavitt was instrumental in having a false affidavit filed in Canada so that the adoption could be completed thereby terminating John's rights and sealing the fate of the custody of his child. PX 39, 334, 343, 358.

The nexus of petitioners' plan was to transport the baby into a jurisdiction which did not recognize the father's rights. Alberta was ideal because if the baby was in the adoptive couple's home for six months, it was impossible to later remove it, even if the father subsequently discovered the child's location and attempted to intervene. Tr. 370-371, 469-470. It was this six month "statute of limitations" which became critical in petitioners' conspiracy. The petitioners then set about to frustrate and obstruct any attempt by John Kessel to find out where the adoption proceeding was located. Petitioners were so desperate to keep John Kessel from discovering this that petitioner Leavitt testified in November in his deposition that he did not know whether a baby was born or if adoption proceedings had been initiated. Tr. 470, Dep. 13-14. A month earlier he had written the Canadian lawyer and instructed him "you may wish to finalize the adoption expeditiously!" Tr. 473, PX 52. He also wrote to Brian Conaty and instructed Brian, Anne's brother, to prevent John Kessel from learning of the adoption or the baby. Tr. 430, PX 57. After a West Virginia trial judge ordered authorization to

produce petitioner Leavitt's file, he sent it out of the country. Tr. 501, PX 64.

Brian Conaty also testified in a West Virginia court proceeding that he had no knowledge of the birth. Tr. 750, PX 80-B. Six days earlier he had received a fax from petitioner Leavitt discussing the birth of the baby. Tr. 1192-1196. Throughout all of this, the West Virginia trial court admonished attorneys representing the other petitioners that obstruction of justice was a serious offense and that the father had constitutional rights and that John Kessel's rights in West Virginia had been established. R. 2012, PX 97, p. 32; R. 2016, PX 98, P. 10; R. 2014, PX 98 p. 32; R. 2020, PX 101, pp. 9-12. In the meantime, petitioner Leavitt gave legal advice with respect to the West Virginia civil action. PX 45, 363. As previously alluded, the West Virginia trial court found other Conaty petitioners in contempt of court for failure to give evidence. PX 7, 210; PX 73, 732; PX 78, 732.[1]

II. Post-Judgment Proceedings Regarding The Judgment, Bond, and Petitioners' Appeal

Contrary to petitioner Leavitt's argument, all of the petitioners – including Leavitt – sought a stay of the judgment pending ruling of the post-trial motions and/or the defendants' anticipated appeal. Res. App. 1. Respondent moved for the trial court to impose a bond securing the judgment pending ruling on the post-trial motions and, if necessary, pending ruling on appeal.

On December 22, 1995, the trial court held a hearing on respondent's motion for bond. At that hearing, the parties discussed alternatives to the petitioners posting a bond as security. The Conatys offered to retain all of their assets

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[1] Respondent respectfully refers the Court to the factual statements contained in the respective opinions of the West Virginia Supreme Court of Appeals and California Court of Appeals for a further discussion of relevant facts and/or inferences in the underlying action. *See* Pet. App. 8a-19a; Res. App. 42-54.

pending appeal, provide a verified listing of their assets, submit to depositions regarding the nature of their assets, and pledge the assets to satisfy the judgment pending appeal. Pet. App. 244a-46a. The court accepted this proposal in lieu of requiring the posting of a bond.

With respect to petitioner Leavitt, however, the trial court and all of the parties recognized that his situation was different than the Conatys. Res. App. 4. Petitioner Leavitt did not own any property in West Virginia. He did not offer to submit to discovery regarding his assets, did not offer to retain and/or not dispose or transfer his assets, and did not offer to pledge the assets to the judgment should it be affirmed. Petitioner did not produce any evidence regarding his assets or ability to post bond. His counsel did state at the hearing that he would be willing to post a bond in the amount of $2,000,000 plus interest. However, subsequently, at the December 27, 1995, hearing on the post-trial motions, defense counsel attempted to partially retreat from his previous statement regarding petitioner Leavitt's willingness and ability to post bond in such amount. Res. App. 6-7. Consequently, faced with no evidence of petitioner Leavitt's assets and no offer of any alternative to posting bond, the trial court entered an order *granting petitioner's motion for stay* conditioned on his posting a $7,000,000 bond. Pet. App. 246a-47a.

Petitioner Leavitt neither posted the bond, moved for reconsideration of it, nor filed any information (verified or not) regarding his assets. Faced with *no* protection of his judgment, respondent retained counsel in California and Virginia and began proceedings to secure the judgment pending the appeal.

Respondent first filed his judgment against Leavitt in the counties in California where petitioner's assets were located. Petitioner then sought vacation of the judgment on personal jurisdiction and/or a stay of the judgment pending resolution of the West Virginia appeal. The original trial court judge assigned to the case in California granted the motion for a stay conditioned on petitioner's posting of a $2,000,000 bond.

Res. App. 8-13. Petitioner did not post the bond. Consequently, respondent began the process of investigating and securing petitioner's assets. In the course of that investigation, respondent discovered that petitioner had begun the process of transferring his assets out of his name. Respondent then initiated an action in California seeking to overturn the fraudulent transfers. Res. App. 17-26. Subsequently, petitioner filed an affidavit from a close friend of the trial judge, and she recused herself from the case. The successor judge, over respondent's objections, reversed the previous judge's ruling and vacated respondent's judgment. The court also dismissed respondent's fraudulent transfer action sustaining the demurrer without leave to amend. Res. App. 51-52, 54. Respondent appealed these rulings to the California Court of Appeals.

Faced with the California court's refusal to provide respondent with any protection for his judgment pending the West Virginia appeal, respondent filed a motion in West Virginia and returned to the West Virginia courts for relief. Following the filing of all of the briefs on the merits, respondent filed a motion to have the Supreme Court of Appeals require the petitioner to post bond in the amount of $7,000,000 or dismiss petitioner's appeal. In response, petitioner questioned the authority of the Supreme Court of Appeals to impose such a requirement. However, prior to the Supreme Court's ruling requiring bond, at no time did petitioner argue that a bond would violate his rights under the United States Constitution. Furthermore, prior to the Supreme Court's ruling requiring bond, other than the conclusory allegation of counsel that petitioner was unable to post a $7,000,000 bond, petitioner did not provide the West Virginia court with any appropriate information regarding the petitioner's assets. On January 16, 1997, the Court granted respondent's motion and entered an order requiring respondent to post the seven-million dollar bond by January 26, 1997, or face dismissal of his appeal. Pet. App. 250a-51a.

On January 21, 1997, petitioner then filed an "emergency" motion to reconsider the bond order. The motion

sought either reconsideration or a stay of the ruling to allow petitioner to present oral argument on both the bond ruling and the merits of the appeal at the oral argument scheduled for January 28, 1997. Respondent then filed a response to the motion and petitioner filed a reply on January 22, 1997. In neither opposition did petitioner provide any documentation or information regarding his assets or ability to post bond. On January 24, 1997, the Court granted the motion to stay the bond order and set the issue of reconsideration for hearing with the hearing on the merits of the appeal scheduled for January 28, 1997. Pet. App. 252a-53a. Oral argument on the merits of the appeal by all parties – including petitioner – occurred as scheduled along with argument on the motion to reconsider bond.

On February 6, 1997, the court entered an order granting, in part, petitioner's motion regarding bond. Pet. App. 254a-55a. In the order, the court reduced the required bond to $1,100,000.00, an amount approximating Leavitt's share of the joint and severally ordered verdict on compensatory damages. *Id.* Following the entry of the February 6, 1997, order, petitioner again moved for reconsideration. In that motion, petitioner noted that he "appreciate[d]" the order reducing the amount of the bond, but admitted that *his argument had not been "that the amount of the 'appeal bond' was too high, but that [the court] has no authority to require such an 'appeal bond.'* " *See* Res. App. 63.

On February 19, 1997, the court denied petitioner's motion for reconsideration. Pet. App. 256a-57a. Petitioner did not post the bond *or offer any other security.* On March 11, 1997, respondent filed a motion to dismiss petitioners' appeal. Res. App. 31-33. Leavitt did not respond to this motion. On March 20, 1997, the court granted the motion and dismissed petitioner's appeal, thereby leaving only the appeal of the Conaty defendants pending for decision. Pet. App. 258a.

On July 19, 1997, petitioner Leavitt filed a Petition for Writ of Certiorari before this Honorable Court. In his petition (No. 97-124), Leavitt raised three separate issues. The issues

consisted of (1) whether the requirement that he post an appeal bond was unconstitutional; (2) whether the exercise of personal jurisdiction over him violated due process; and (3) whether the punitive damages award against him was unconstitutional under this Court's pronouncement in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996).[2] Respondent filed a brief in opposition to such petition on August 18, 1998. The Petition was denied by the Court on October 6, 1997. Pet. App. 259a.

Thereafter, on June 15, 1998, the California Court of Appeals rendered its opinion (portions of which have been quoted *infra*) in which it reversed the trial court's order granting the motion to vacate the judgment and reinstated the judgment in the respondent's recognition and execution action and reversed the order sustaining the demurrer without leave to amend in the respondent's fraudulent conveyance action. Res. App. 39-66. Respondent was also awarded his cost of appeal and the Court's opinion was certified for publication.

Subsequently, on July 22, 1998, the West Virginia Supreme Court of Appeals rendered its opinion affirming the judgment of the Cabell County Circuit Court. *Kessel v. Leavitt*, ___ W.V. ___, ___ S.E.2d ___, 1998 WL 407096 (No. 23577 July 22, 1998); Pet. App. 1a-231a. More specifically, the Court affirmed the jury's verdict on respondent's fraud claim against all defendants and affirmed the jury's verdict on respondent's tortious interference with parental relations claim against all defendants with the exception of petitioner Anne Conaty. Pet. App. 1a-231a. Petitions for rehearing were then denied by the Court on September 10, 1998, and September 17, 1998. Pet. App. 234a-235a.

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[2] The first and third issues raised in such petition (No. 97-124) by petitioner Leavitt are essentially identical to the second and third issues raised in petitioners' present petition for writ of certiorari. Respondent submits that petitioners' present petition should be denied as to petitioner Leavitt on the basis that this Court has already considered and denied his arguments in his first petition.

On October 14, 1998, the California Supreme Court denied review of the June 15th opinion of its Court of Appeals and directed that the latter's opinion not be published in the official appellate reports. Res. App. 38.

REASONS FOR DENYING THE PETITION

I. This Court Should Decline To Review The Final Order Of The West Virginia Supreme Court of Appeals On the Bases That The State High Court Allegedly Misstated or Misapplied This Court's Decision In *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L.Ed.2d 614 (1983).

A review of the West Virginia Supreme Court of Appeals' discussion of *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L.Ed.2d 614 (1983), reveals that it did not misstate the holding of this Court in such decision. *See* Pet. App. 36a-38a. It is important to recognize the limited context in which *Lehr v. Robertson*, *supra*, was cited and utilized by the State High Court. Respondent's case was not presented to the jury on the basis of federal claims but rather on the bases of state common law claims for fraud and tortious interference with parental relations.[3]

Prior to discussing the merits of these common law claims, the State High Court sought to explain the context in which respondent's claims arose. Essentially, the Court noted that respondent claimed that the petitioners, through fraudulent and tortious conduct, had prevented him from establishing and protecting both his constitutional and natural rights as the biological father of the child. However, before turning its attention to the specific factual issues presented in this case,

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[3] Respondent had initially also set forth a claim under 42 U.S.C. § 1983, alleging that the petitioners had deprived him of his rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. However, the trial court granted summary judgment on such claim on the basis that the petitioners were not state actors acting under the color of state law. Pet. App. 168a & n. 90.

the Court began its discussion with a general recitation of the constitutional and natural rights of biological fathers. Pet. App. 34a-46a. In addition to citing and discussing several of its own prior decisions relevant to the issue and numerous decisions of sister state courts,[4] Pet. App. 36a-41a, the West Virginia Supreme Court of Appeals accurately quoted from relevant portions of this Court's decision in *Lehr*. Pet. App. 36a-38a.

The Court then turned its attention to the circumstances presented in the instant case, noting:

> The circumstances of the instant appeal, though, are somewhat unusual in that, allegedly as a result of the defendants' actions, John was unable to assert his paternal rights by establishing a parental relationship with Baby Boy Conaty. Because the child was placed for adoption with a Canadian family almost immediately after his birth, John was not permitted the opportunity to see or otherwise visit with his son, much less provide for his support and otherwise fulfill his parental obligations. Several courts have recognized that when the child with respect to whom a father attempts to assert his parental rights is a newborn infant, a slightly modified inquiry is appropriate to determine whether the father has "grasped the opportunity" to establish a parent-child relationship.

Pet. App. 41a-42a.

The Court then proceeded to cite, quote and/or discuss such decisions, all of which were decisions of sister state courts. Pet. App. 42a-45a. Upon completing such discussion, the Court concluded:

> Thus, it appears that John would have had a valid basis for asserting a constitutionally protected right

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[4] Because of the space limitations governing this brief, respondent is not including specific citation in the body of this brief to the numerous cases cited or relied upon by the West Virginia Supreme Court of Appeals in its exhaustive opinion but rather is referring the Court to the appropriate pages of the opinion as set forth in petitioners' appendix.

> to establish and maintain a parent-child relationship with his son despite his inability to have his physical custody or to visit with him prior to his pre-adoptive placement into Canada.

Pet. App. 45a-46a (footnote omitted).

The Court then turned its attention to a discussion of the specific state common law claims raised by John which were the bases of the jury's verdict. After examining West Virginia law setting forth generally the elements for a claim of fraud and civil conspiracy and the decisional law of sister state courts which have involved to at least some degree allegations of fraud in custody or adoption disputes, Pet. App. 47a-57a, the Court concluded:

> Despite the lack of precedent recognizing a claim based in tort and sounding in fraud in circumstances fairly analogous to those underlying the instant appeal, this jurisprudential absence does not, alone, foreclose our recognition of such a claim. "As previously stated, . . . a lack of precedent – standing alone – is an insufficient reason to deny a cause of action." . . . Notwithstanding an unwed biological father's responsibility to affirmatively protect his own rights, by "grasping the opportunity" to demonstrate his commitment to assuming parental responsibility for his child, we cannot condone the actions of the defendants in this case who, by their conduct, wrongfully interfered with John's ability to establish and assert his parental rights. Accordingly, we hold that the instant a child is born, both unwed biological parents have a right to establish a parent-child relationship with their child. To preserve his parental interest vis-a-vis his newborn child, an unwed biological father must, upon learning of the existence of his child, demonstrate his commitment to assume the responsibilities of parenthood by coming forward to participate in the care, rearing, and support of his newborn child

> and by commencing to establish a meaningful parent-child relationship with his child.
>
> Further, where a person has knowledge of information concerning a newborn child's birth or physical location, or indicating where and in whose care the child may be found, and the child's parent inquires of such person regarding his/her child's birth or physical location, and/or where and in whose care his/her child may be found, such person may be held liable for fraudulently concealing information if he/she affirmatively, intentionally, and willfully fails to provide such information to the child's parent pursuant to his/her request for such information and such concealment unduly hinders or otherwise irreparably harms the parent's ability to establish a parent-child relationship with his/her child. Additionally, we hold that any person or persons who plot, plan, scheme, or otherwise conspire to affirmatively, intentionally, and willfully conceal information regarding a newborn child's birth or physical location, or indicating where and in whose care the child may be found, in response to inquiries by the child's parent for such information, may be held liable for his/her or their participation in such civil conspiracy.

Pet. App. 57a-59a (footnotes omitted).[5] The Court did not affirmatively rely upon or cite any federal law or decisions in reaching the above holding concerning respondent's state common law claim of fraud. The Court then proceeded to uphold John's claim of fraud against the defendants. Pet. App. 61a-62a & n. 38.

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[5] It should be further noted that the West Virginia Supreme Court of Appeals emphatically noted its decision's intended effect and scope, stressing that such decision was carefully designed to not infringe upon or adversely effect the options or rights, constitutional or otherwise, of pregnant women or the best interests of children. Pet. App. 45a n. 30, 46a n. 31, 47a-48a n. 32, 48a-49a n. 33, 58a n. 35, 59a-60a n. 37, 82a-83a.

The Court then turned to respondent's state common law claim of tortious interference with parental relations. Upon discussing the law of West Virginia addressing other various claims of tortious interference, the law of West Virginia favoring the custodial rights of natural parents, the criminal statutory law of West Virginia penalizing unlawful custodial interference, and the law of other state courts recognizing claims for tortious inference with parental relations, the West Virginia Supreme Court of Appeals concluded:

> Based upon the prior recognition of other tortious interference claims by this Court, our criminal statutes providing penal remedies for unlawful custodial interference, and the high esteem with which we regard the rights of parents to maintain relationships with their children, we find that it is proper to recognize, as a valid cause of action, the claim of tortious interference as asserted by John. Accordingly, we hold that a parent may maintain a cause of action against one who tortiously interferes with the parent's parental or custodial relationship with his/her minor child, which right accrues the instant the child is born.

Pet. App. 81a (footnote omitted). The Court did not affirmatively rely upon or cite any federal law or decisions in reaching the above holding concerning respondent's state common law claim of tortious interference with parental relations. The Court then proceeded to uphold John's claim of tortious interference with parental relations against the defendants, with the exception of petitioner Anne Conaty.[6] Pet. App. 84a-88a & n. 52.

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[6] The Court also held both that a defendant could assert certain affirmative defenses to such a claim and that "a parent cannot charge his/her child's other parent with tortious interference with parental or custodial relationship if both parents have equal rights, or substantially equal rights . . . to establish or maintain a parental or custodial relationship with their child." Pet. App. 82a-83a. Accordingly, on this latter basis, the Court declined to affirm the jury's verdict as to John's claim of tortious interference with parental relations against petitioner Anne Conaty. Pet. App. 84a-85a.

Petitioners attempt to create a basis for this Court's jurisdiction to review the above holdings of the State High Court by arguing that the holdings were premised upon a misstatement or misapplication of this Court's holding in *Lehr, supra*. Respondent submits that neither a misstatement nor misapplication of *Lehr* occurred or was otherwise relied upon by the State High Court in reaching its holdings. Additionally, it should be noted that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Rule 10 of the Rules of the Supreme Court of the United States.

Innumerable cases of this Court as well as lower federal courts note the related but distinct propositions that (1) a state can award its citizens greater rights and protections than those granted under the United States Constitution and (2) violations of state common law tort claims can exist as a result of conduct which does not reach the magnitude or prerequisites of a federal constitutional violation. It is beyond dispute that the jurisdiction of this Court to review writs of certiorari is limited. *See* Rule 10 of the Rules of the Supreme Court of the United States. A holding of a state court based upon state law, falling within either of the above propositions, is simply not reviewable by this Court.

Moreover, even where federal law is involved in a state court decision, this Court will decline to review such decision if based upon an adequate and independent state ground. Where a state court decision relies upon both state and federal law, this Court will only review such decision if it "fairly appears to rest primarily on federal law, or to be interwoven with federal law, *and* when the adequacy and independence of any possible state law ground is not clear from the face of the opinion". *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S. Ct. 3469, 3476, 77 L.Ed.2d 1202 (1983) (emphasis added).

Obviously, state common law tort claims of fraud and tortious interference with parental relations are not federal

claims and are adequate and independent state grounds sufficient to support a state court judgment. These were the only claims or causes of action which were presented to the jury in this case and affirmed by the State High Court.

That federal law was not impermissibly interwoven with these claims, or otherwise did not lead the State High Court to believe it had to construe its own laws in the manner that it did, is supported by the fact that the Court interpreted a jury instruction which was given explaining the natural rights of a parent to the custody of his/her child to be consistent with and supported by the law of West Virginia, Pet. App. 157a-65a, but disapproved of two other instructions which specifically referred respectively to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution as being given in error since respondent's claims were not governed by federal law,[7] Pet. App. 166a-72a.

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[7] The Court noted that the trial court abused its discretion in giving the latter two instructions because respondent had no viable claims under either the Due Process or Equal Protection Clauses of the Fourteenth Amendment since no state actors were parties in the suit. Pet. App. 166a-71a. The Court concluded, however, that the error in giving the instructions were harmless inasmuch "as the remainder of the jury instructions, viewed in their entirety, correctly instructed the jury on the applicable law"; "no special emphasis was placed upon these two instructions by the trial court or the parties"; no prejudice was created by the instructions since they merely indicated that the jury could infer from the alleged constitutional violations that the defendants had committed the tortious acts of which they were accused, rather than directly stating that a finding of such alleged constitutional violations necessitated a finding that defendants had also acted tortiously; and that the record was replete with voluminous incriminating evidence supporting plaintiff's claim of fraud. Pet. App. 171a-72a.

II. The West Virginia Court's Order Requiring The Petitioner To Post An Appeal Bond Did Not Violate His Right To Due Process And Equal Protection.

This Court recognized long ago that due process permits a Court to condition access to the appellate process upon the posting of assets adequate to secure the judgment on appeal:[8]

> Where the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration.
>
> * * *
>
> Viewing the dismissal of petitioner's appeal in the light of its reasonableness in sustaining the effectiveness of a state's judicial process, as against the rights of a judgment debtor, without filing a supersedeas bond, to refuse to comply with orders safeguarding the value of that judgment, we find nothing that violates due process of law.

National Union v. Arnold, 348 U.S. 37, 44-45 (1954).

Applying this holding, the *National Union* Court affirmed the dismissal of an appeal by the Washington Supreme Court when the judgment debtor refused to comply with the court's order requiring it to transfer its only assets from California to a Washington receiver. *Id.* Contrary to petitioner's argument, *National Union* is not distinguishable. Like the plaintiff in *National Union*, respondent attempted unsuccessfully to secure the defendant's property in California pending appeal. Following the California courts' refusal to grant them relief both returned to the appellate court reviewing the judgment for relief. While the relief sought and obtained may differ in kind, both received an order requiring the judgment debtor to secure the judgment as a condition for

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[8] The Court explained its reasoning and authority for dismissing Leavitt's appeal due to his failure to post the ordered appeal bond in its decision. Pet. App. 24a-26a.

prosecuting the appeal. Any differences in the manner of effectuating the relief have no constitutional significance.[9]

The validity of *National Union* has withstood the test of time. In *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court found unconstitutional an Oregon appellate bond requirement that a tenant appealing an adverse ruling post a bond in the amount of double the accrued rent with the entire bond being automatically forfeited should the judgment be affirmed.[10] *Lindsey*, however, made clear that the principles set forth in *National Union v. Arnold* remained good law noting that "a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, [and] to guard a damage award already made . . . " 405 U.S. at 77. Indeed, the *Lindsey* Court explicitly reaffirmed the validity of *National Union*. *See id.* at 78 ("We do not question here reasonable procedural provisions to safeguard litigated property, *cf. National Union* [*supra*]"). Likewise other opinions of this Court recognize the propriety of appellate procedures designed to regulate the appellate process to protect winning litigants against improper actions by losing litigants who attempt to appeal.[11]

In this case, the Supreme Court of Appeals ordered Leavitt to post a bond in an amount of his share of the compensatory verdict. The bond ultimately ordered was only a portion of the judgment against petitioner. Thus, unlike

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[9] Indeed, requiring the posting of a bond or other security is certainly less burdensome than requiring petitioner to transfer the assets to West Virginia.

[10] The flaw with the Oregon statute was that the double-bond requirement was unrelated to actual rent accrued or to specific damage sustained by the landlord and, therefore, was unnecessary to assure the landlord payment of accrued rent. 405 U.S. at 77.

[11] *See Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (affirming, the Supreme Court affirmed the application of Mississippi's 15% appellate penalty statute imposed on parties who appeal unsuccessfully from money judgments or other categories of judgments whose value may be readily determined).

Lindsey, the amount of the bond ultimately ordered bears more than a reasonable relationship to respondent's verdict against petitioner, and thus, the bond requirement imposed no penalty on petitioner as a prospective appellant.[12]

Petitioner's argument that the West Virginia bond requirement violates well-established procedural norms is contradicted by the cases he cites. Indeed, even this Court's precedents regarding security requirements establish that other courts have applied similar appellate procedures imposing security or other procedural requirements. The general appeal bond provisions approved in Lindsey, along with the procedures approved in *National Union* and *Crenshaw* represent examples of "reasonable procedural provisions to safeguard litigated property," pending appeal. *Lindsey, supra.*

Other examples of similar appellate requirements appear in the reported cases.[13] As the court in *Patterson, supra,* noted:

> Legislatures, except where inhibited by Constitutional mandate, have had the power generally to regulate appellate procedure, *including the authority to require the giving of a bond as a condition precedent to the consummation of an appeal.* 4A C.J.S. Appeal & Error 502, p. 208. *In many jurisdictions, statutes have been passed requiring, as a*

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[12] Even the original order providing for an appeal bond in the amount of the punitive award finds sanction in *Lindsey. See* 405 U.S. at 78 (noting that a state has "broad authority" to require appeal bond for judgments providing for double or treble damages "even though posting an appeal bond will be doubly or triply more difficult").

[13] *See Patterson v. Warner*, 371 F. Supp. 1362 (S.D.W.Va. 1972) (three judge panel approving constitutionality of the bond requirements of former W. Va. Code § 50-15-2 requiring the posting of bond double the amount of the judgment to appeal judgment rendered by Justice of the Peace); *Scott v. Morrison*, 1993 U.S. App. LEXIS 14896 (4th Cir. 1993) (approving constitutionality of Virginia requirement requiring appeal bond for rent which has accrued and may accrue but not to exceed one year's rent).

> *condition precedent to taking or perfecting an appeal, that the appellant, or plaintiff in error, must give a bond, recognizance, or undertaking for payment of the judgment, order or decree.*

371 F. Supp. at 1364-65 (emphasis added). Thus, the security requirement imposed on petitioner does not constitute "a change in ancient procedure . . . which disregards . . . fundamental principles" of due process. *Twining v. New Jersey*, 211 U.S. 78, 101 (1908).

Indeed, even applying the *Mathews v. Eldridge*, 424 U.S. 319 (1976), test urged by petitioner, the bond requirement does not violate due process. The petitioner's interest in the judgment against him must be balanced against the state's interests in "guard[ing] a damage award already made . . . " *Lindsey, supra.* When the judgment debtor has no assets in the forum state, a requirement of bond or other security is the only way to protect that interest. Moreover, the risk of an erroneous deprivation of petitioner's property is nonexistent as the requirement that security be posted only guarantees that the security posted would be paid should the judgment be affirmed. *National Union, supra.*

Finally, this Court's precedents regarding access to the appellate process are not applicable to the facts of this case. Petitioner had access to the appellate process. However, as a condition to that access, he was required to post security.[14]

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[14] Petitioner Leavitt's reliance on *BMW of North America v. Gore*, 517 U.S. 559 (1997), and *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), are misplaced. The *Honda Motor* court struck down a state procedure that forbids punitive damage review by both the trial court and the appellate courts. 512 U.S. at 420-21. In this case, petitioner received a thorough post-judgment review of the punitive damage award by the trial court. Nothing in *Honda Motor* or in *BMW* requires a court to disregard otherwise constitutional appellate procedures in order to review a punitive damages award. Petitioner points to nothing about punitive damages that requires a state court to disregard its appellate procedures in order to review a punitive damages award. Petitioner would have this Court create a constitutional right to appellate review of punitive damages awards that

The West Virginia courts' orders described above show the courts' flexibility in balancing the litigants' rights in determining security. As noted above, respondents offered alternatives to the bond that were rejected by petitioner. At all times in West Virginia, petitioner steadfastly refused to agree to any security or even submit to discovery regarding his assets. Given both these facts and this Court's opinions regarding appeal bonds, no denial of a right of access to the appellate courts has been shown.

III. This Court's Decision in *BMW* Does Not Require Vacating the Punitive Damages Awarded Against the Petitioners.

Petitioners contend that their due process rights were violated because they were held liable for punitive damages for conduct that was legal in California, the jurisdiction where they allege the actions occurred, and they had no notice that their actions might subject them to punitive damages. Petitioners cite this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996) (plurality opinion), as the support for their argument.

Petitioners argue that the award of damages against them violates the following principle discussed in *BMW*:

> We think it follows from [ ] principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its law with the intent of changing the tortfeasors' lawful conduct in other States. . . . To avoid [encroachment on the

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does not exist in many other more serious instances. *See Lindsey*, 405 U.S. at 77; *National Union*, at 304 at 41-42. Petitioner had an expectation to have his punitive damage award reviewed on appeal if he obeyed the Court's requirements. He did not have the right to have that review while he transferred assets and otherwise frustrated respondent's right to have his judgment secured pending appeal.

> policy choices of other States], the economic penalties that a State such as Alabama inflicts on those who transgress its laws . . . *must be supported by the State's interest in protecting its own consumers and its own economy*. . . . Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred *and that had no impact on Alabama or its residents*. . . .

Id., 517 U.S. ___, 116 S. Ct. at 1597-98 (emphases added).

The West Virginia Supreme Court of Appeals carefully reviewed in its decision the punitive damages awarded against the petitioners, including those arguments then raised before it concerning *BMW*.[15] Pet. App. 196a-211a. Despite that Court's careful review, petitioners continue to assert that their due process rights were violated in such regard.

Petitioners argue that their conduct was legal in California and, therefore, they had no notice that they might be subjected to an award of punitive damages. In addressing this contention, the Supreme Court of Appeals first noted that based upon California law, the law of the jurisdiction in which the adoption petition was filed and/or finalized would more appropriately govern the alleged legality of the petitioners' conduct, which in this case was Alberta, Canada, not California. Because the petitioners had not briefed the legality of their actions under the law of Alberta, Canada, the Court concluded that petitioners had waived such assignment of error under its decisional law and Rules of Appellate Procedure. Pet. App. 206a-07a.

Giving the petitioners the benefit of the doubt, however, the Court also examined whether their behavior complied with the law governing such conduct in California in 1991. The Court concluded that the petitioners' conduct violated that law of California which provided a cause of action for

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[15] Respondent submits that any arguments now raised by petitioners which were not previously raised before the State High Court should not be considered by this Court.

"intentional concealment of a material fact," citing *Stevens v. Superior Court*, 180 Cal.App.3d 605, 608-09, 225 Cal.Rptr. 624, 626 (1986). Pet. App. 207a. While petitioners attempt to insist to this Court that their conduct would not be illegal under California's law of intentional concealment of a material fact as set forth in *Stevens*, they ignore the fact, as previously set forth in this brief, that the California Court of Appeals rejected the argument that such conduct did not violate California's law and found the conduct to be "immoral, reprehensible, and dishonest", the facts "egregious", and petitioner responsible for affirmative misrepresentations. When viewed in this light, this Court should give the West Virginia Supreme Court of Appeals' conclusion that petitioners' conduct violated the law of California the benefit of the doubt.

Additionally, it should be noted that petitioners ignore a relevant portion of this Court's holding in *BMW*, as quoted in emphases above. Unlike BMW, which was punished for its actions injuring persons in other states when such actions were legal in such other states, petitioners were punished for their actions that impacted on West Virginia and injured respondent, who was a West Virginia resident at the time of his injury. Clearly, under the reasoning of *BMW*, West Virginia has a recognized interest in protecting its citizens, both adult and children, and their respective rights, regardless of whether all of the tortious conduct actually occurred in West Virginia.

Similarly, petitioners also ignore that much of the egregious conduct of the Conaty petitioners actually occurred in West Virginia and that petitioner Leavitt was orchestrating and directing most of that conduct from California. When viewed in this context, petitioners' argument also fails.

Next, petitioners argue that *BMW* is violated because petitioners had no notice that their conduct violated West Virginia law or any other allegedly applicable law and that the holdings of the West Virginia State Courts therefore constitute unconstitutional *ex post facto* laws. This argument of the

petitioners fails for the very same reasons set forth above. Moreover, it should be noted that fraud and conspiracy to commit fraud are common law torts that were part of West Virginia and California law since their inception. Additionally, at trial, Leavitt himself admitted that placing the baby with knowledge of the injunction would have been wrong. While petitioner denied knowledge of the injunction, the jury specifically found otherwise on evidence of record. Indeed, the fact that Leavitt directed Anne Conaty to flee to California is a recognition of his knowledge of the position of West Virginia on the issue.

Petitioners also suggest that they had no notice that such a large punitive damages award could be awarded against them for their conduct and that the amount of the award is too high. Given the nature of petitioners' intentional and deliberate conduct and the extreme loss it caused respondent, a punitive damages award constituting a little over twice the compensatory damages award should not have been a surprise. Nor under these circumstances is the amount of the award constitutionally excessive. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711, 125 L.Ed.2d 366 (1993) (approving West Virginia procedure and verdict which led to a $10,000,000 punitive damages award that was more than 500 times compensatory damages award). Given petitioners' continued insistence that they did nothing wrong, one could argue that the punitive damages award was too low.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied in all respects as to all petitioners.

Most respectfully submitted.

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IN THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL and
RAY MILLER KESSEL,

Plaintiffs,

Vs. CIVIL ACTION NO. 92-C-2141

DAVID KEENE LEAVITT,
ANNE GILMORE CONATY,
ELEANOR WOLFE CONATY,
THOMAS CONATY, and
BRIAN P. CONATY,

Defendants.

MOTION TO STAY PROCEEDING
TO ENFORCE A JUDGMENT

Come now the defendants Rule 62(i), W.V.R.C.P., and the defendants move the Court to stay enforcement of the judgment against them for a period of 6 months so that the defendants may present a petition for appeal of said judgment to the West Virginia Supreme Court of Appeals.

DEFENDANTS,
By Counsel

/s/ George A. Stolze
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Huntington, West Virginia 25701

IN THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL and
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BRIAN P. CONATY,

Defendants.

CERTIFICATE OF SERVICE

I, George A. Stolze, of counsel for the Defendants, do hereby certify that I have served the foregoing Motion to Stay Proceeding to Enforce a Judgment upon the Plaintiffs by depositing a true copy thereof the United States mails, postage pre-paid, in an envelope addressed to Marvin W. Masters, Masters & Taylor, L.C., Fourth Floor Peoples Building, 179 Summers Street, Charleston, West Virginia 25301-2177, counsel of record for the Plaintiffs, this 15th day of December, 1995.

/s/ George A. Stolze
GEORGE A. STOLZE

[p. 2] IN THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL,
et al.,

Plaintiffs,

vs. CIVIL ACTION NO. 92-C-2141

DAVID KEENE LEAVITT,
et al.,

Defendants.

BOND HEARING had in the above-styled action before the Honorable O. C. Spaulding, Judge, on Friday, the 22nd day of December, 1995.

APPEARANCES

MR. MARVIN MASTERS and ANTHONY J. MAJESTRO, Attorneys at Law, Charleston, West Virginia, Counsel for the Plaintiffs.

MR. GEORGE STOLZE, Attorney at Law, Huntington, West Virginia, Counsel for the Defendants.

Judith A. Greene,
Official Reporter

* * *

[p. 20] that, Your Honor. We simply don't want to freeze the income flow to Dr. and Mrs. Conaty, because they have to eat.

THE COURT: Developing such documents with those institutions that the Conatys can't come in and take a quick cash payout and head down the road.

MR. STOLZE: I'm sure there's some way to do that with these institutions, contractually.

THE COURT: I would think so. Now, let's talk about Mr. Leavitt. I do see Mr. Leavitt in a different category because he has no financial ties directly here to West Virginia.

MR. STOLZE: Well, obviously Mr. Leavitt is in a special category. On the other hand, though, Mr. Leavitt will not be able to post a bond in order to provide security in this state worth seven million dollars. That's a lot of money for any individual to come up with. We would not object to a two million dollar – to providing security in the amount of two million dollars plus interest.

MR. MAJESTRO: We don't have the financial statements that have been provided to the Court. Has Mr. Leavitt's statement?

MR. STOLZE: No. We don't have a financial

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[p. 1] IN THE CIRCUIT COURT OF CABELL COUNTY
WEST VIRGINIA

JOHN WOODRUFF KESSEL and, RAY MILLER KESSEL, PLAINTIFFS, VS. DAVID KEENE LEAVITT, et al., DEFENDANTS.	CIVIL ACTION NO.: 92-C-2141

POST-TRIAL MOTIONS

Transcript of the proceedings had in the hearing of the above-styled action before the Honorable O. C. Spaulding, Judge, on Wednesday, the 27th day of December, 1995.

APPEARANCES:

MARVIN MASTERS, Esq., and ANTHONY MAJESTRO, Esq., Charleston, West Virginia, Counsel for the Plaintiffs.

GEORGE STOLZE, Esq., Huntington, West Virginia, Counsel for the Defendants.

JO ANN STEWART
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JO ANN STEWART, CCR

* * *

[p. 107] a bond in this state anyway, because no surety company would write him one. Of course what happens is if the appeal is not granted or the appeal is lost, then the surety company has to pay the judgment or whatever the amount of the bond is, and then they seek to get the money back from Mr. Leavitt who doesn't have enough money to pay them presumably. So that is the only thing I can offer in Mr. Leavitt's behalf, and the Court can exercise his discretion in that regard.

THE COURT: Mr. Masters.

MR. MASTERS: Well, your Honor, we would request and move that the Court require full bond on the part of Mr. Leavitt. One of the things that is somewhat confusing to me is the last hearing George said that, as I understood what he said, was they were willing to post a $2,000,000 bond, that's my memory from Mr. Leavitt.

MR. STOLZE: No, I asked that bond be set in that matter. I said didn't say [sic] he was willing to post it or that he could post it.

MR. MASTERS: That was my understanding. That's the way I recall it.

MR. STOLZE: I don't believe he could post it.

MR. MASTERS: We do not believe that his assets are that limited. And we have no verification here today of

* * *

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date: August 9, 1996

HONORABLE:	LORNA PARNELL	JUDGE
	M. BRYANT	DEPUTY SHERIFF
	G. TAPANES	DEPUTY CLERK
	C. SANDERS	ERM

SSOO6478

JOHN WOODRUFF KESSEL

vs.

DAVID KEENE LEAVITT

(Parties and counsel checked if present)

Counsel for Plaintiff:

Counsel for Defendant:

NATURE OF PROCEEDINGS: RULING ON SUBMITTED MATTER

The motion of defendant, David Keene Leavitt, to Vacate Judgment or in the alternative, for Stay of Enforcement of Judgment came on before the Court for hearing on 05-15-96. Based on the evidence presented and the applicable law, the Court now rules as follows.

Defendant David Keene Leavitt ("Leavitt") has filed a motion asking for this Court to either (1) vacate the judgment entered against defendant on the sister-state judgment entered in the Circuit Court of Cabell County, West Virginia in the case of John Woodruff Kessel and Ray Miller Kessel, plaintiffs v. David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty,

and Brian P. Conaty, Defendants, Civil Action No. 92-C-2141 (the "West Virginia action"), or, in the alternative, (2) stay enforcement of the judgment entered on the sister state judgment. Plaintiff, Dr. John Kessel, opposes the motion to vacate, but does not oppose the request for a stay of enforcement of the judgment provided that defendant Leavitt posts an undertaking sufficient to secure payment of the West Virginia judgment.

Following oral argument and extensive briefings, the matter was taken under submission by the Court.

The facts giving rise to the West Virginia action present a rather interesting and unique situation. Those facts, many of which are contested, need not be repeated in great detail here in light of this Court's determination as set forth herein. The procedural background is set forth briefly hereinbelow.

Defendant Leavitt is a resident of California. The other defendants in the West Virginia action are residents of West Virginia. Defendant Leavitt is alleged to have, inter alia, conspired with the other defendants, which conspiracy caused harm to plaintiff. When he was sued by plaintiff in the West Virginia action, defendant Leavitt moved for dismissal for lack of personal jurisdiction over him. Plaintiff opposed that motion, and the issue of personal jurisdiction was litigated in the West Virginia action. The West Virginia court denied defendant's motion to dismiss for lack of personal jurisdiction. Defendant thereafter filed an Answer to the Complaint in the West Virginia action wherein he asserted lack of personal jurisdiction as an affirmative defense. The matter went to trial, and a judgment of seven million dollars plus prejudgment

interest and costs was rendered against defendant Leavitt. The judgment of seven million dollars included five million dollars in punitive damages.

In post-judgment proceedings in the West Virginia action, enforcement of the judgment was stayed as to the West Virginia defendants based upon certain conditions which were satisfactory to the West Virginia court. As to a stay of the judgment with respect to defendant Leavitt, the West Virginia court held:

"It appearing to the Court that no evidence had been offered by said Defendant Leavitt of his financial condition, and although his counsel had made representations as to his approximate worth, no financial statement was provided and no offer was made by said defendant to provide security by bond or otherwise at the hearing on this date. The Court, after considering the evidence in this case and after considering the judgment and the situation of the parties, particularly that the defendant has no assets in the State of West Virginia, that he is not a resident of the State of West Virginia, that he has made no offer in any way to provide security of the judgment, it is ADJUDGED, ORDERED and DECREED that the stay of execution of the judgment in this matter be granted to said defendant DAVID KEENE LEAVITT upon posting with the Circuit Court of Cabell County good and sufficient bond in the amount of Seven Million Dollars to satisfy the Judgment, interest and costs in this proceeding."

No bond was posted by defendant Leavitt in West Virginia, and enforcement of the judgment has therefore not been stayed.

Plaintiff then had his sister state judgment entered here in California. Defendant has now filed his motion to vacate or to stay enforcement of the West Virginia judgment. Defendant contends, inter alia, that the West Virginia court did not have jurisdiction over him, that punitive damages were improperly awarded against him, and that other errors occurred at the trial which warrant reversal of the judgment. Plaintiff, naturally, disputes all of these contentions.

Defendant Leavitt (and the other defendants) have appealed the judgment in the West Virginia action to the West Virginia Supreme Court. On appeal, defendant Leavitt contends, inter alia, that the judgment against him should be vacated since the West Virginia court did not have jurisdiction over him. At the time that this matter was first argued before this Court, defendant Leavitt had filed a petition to appeal the West Virginia judgment, but it was not certain whether there would be any appellate review of the judgment in West Virginia action since, according to information provided to this Court, appellate review is a matter of discretion and not a matter of right in West Virginia in civil actions. However, during the time that this matter has been under submission, the West Virginia Supreme Court has accepted the appeal for review. According to information provided to this Court, the case will be fully considered on appeal and a written opinion will be issued by the West Virginia Supreme Court after additional briefing. All of this is likely to occur before May, 1997.

In light of the fact that the judgment in the West Virginia action, including the question of personal jurisdiction over defendant Leavitt by the West Virginia court, is

being fully reviewed by the West Virginia Supreme Court based upon a full record, this Court considers that the most appropriate action to be taken by it is to grant defendant Leavitt's request for a stay pending the review by the West Virginia Supreme Court.

This Court is authorized to stay enforcement on a judgment while an appeal is pending in a sister state "on such terms and conditions as are just." This may include the requirement that the defendant post an undertaking.

As noted earlier, enforcement of the judgment was ordered stayed by the West Virginia court if defendant Leavitt posted a bond in the amount of the judgment – seven million dollars. That court was familiar with all of the evidence in the case, the judgment, and the situation of the parties. For reasons which are not clear to this Court, defendant Leavitt did not provide evidence of his financial condition to the West Virginia court when the matter of the stay and the bond were being considered by that court (or at any other time that the matter was pending in that court).

At one point in the proceedings before the West Virginia court, counsel for defendant Leavitt represented to that court that, although defendant Leavitt could not post a bond in the amount of seven million dollars, defendant "would not object to providing security in the amount of two million dollars plus interest."

Since two million dollars is the amount of compensatory damages awarded to plaintiff against defendant Leavitt, the Court considers it appropriate to grant defendant Leavitt's request for a stay of enforcement of judgment on

condition that defendant Leavitt provide an undertaking in the amount of two million dollars.

Upon posting of the required undertaking with this Court, enforcement of the judgment in California against defendant Leavitt is stayed until proceedings on appeal in the West Virginia Supreme Court have been concluded, or until further order of this Court.

Dated: August 9, 1996

Lorna Parnell
Judge of the
Superior Court

A true and correct copy of this minute order is sent VIA U.S. Mail this date to the following:

SUMMONS
(CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT: ***(Aviso a Acusado)***

DAVID KEENE LEAVITT, an individual, AILEEN LEAVITT, an individual, KERRY LEAVITT, aka KAREN LEAVITT, an individual, and DOES 1 through 10, inclusive

YOU ARE BEING SUED BY PLAINTIFF:
(A Ud. le está demandando)

JOHN WOODRUFF KESSEL

You have *30 CALENDAR DAYS* after this summons is served on you to file a typewritten response at this court.

A letter or phone call will not protect you; your typewritten response must be in proper legal form if you want the court to hear your case.

If you do not file your response on time, you may lose the case, and your wages, money and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

Después de que le entreguen esta citación judicial usted tiene un plazo de 30 DIAS CALENDARIOS *para presentar una respuesta escrita a máquina en esta corte.*

Una carta o una llamada telefónica no le ofrecerá protección; su respuesta escrita a máquina tiene que cumplir con las formalidades legales apropiadas si usted quiere que la corte escuche su caso.

Si usted no presenta su respuesta a tiempo, puede perder el caso, y le pueden quitar su salario, su dinero y otras cosas de su propiedad sin aviso adicional por parte de la corte.

Existen otros requisitos legales. Puede que usted quiera llamar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de referencia de abogados o a una oficina de ayuda legal (vea el directorio telefónico).

CASE NUMBER: *Nuniceor del Caso)*
SC043857

The name and address of the court is: *(El nombre y dirección de la corte es)*

SUPERIOR COURT OF CALIFORNIA
1725 Main Street
Santa Monica, California 90401
WEST DISTRICT

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is: *(El nombre, la dirección y el numero de teléfono del abogado del demandante, o del demandante que no tiene abogado, es)*

DOBRIN & BRONNER
Brian L. Dobrin
Deborah P. Bronner
1999 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
(310) 57[illegible]-1992

DATE: *(Fecha)* AUG 26 1996

Clerk, by /s/ Illegible, Deputy
(Actuario) D.R. Callicoatte *(Delegado)*

[SEAL]

NOTICE TO THE PERSON SERVED: You are served

1. [ ] as an individual defendant.
2. [ ] as the person sued under the fictitious name of *(specify)*:
3. [ ] on behalf of *(specify)*:

under: [ ] CCP 416.10 (corporation)
[ ] CCP 416.20 (defunct corporation)
[ ] CCP 416.40 (association or partnership)
[ ] CCP 416.60 (minor)
[ ] CCP 416.70 (conservatee)
[ ] CCP 416.90 (individual)
[ ] other:

4. [ ] by personal delivery on *(date)*:

DOBRIN & BRONNER
BRIAN L. DOBRIN, Esq. SBN: 159552
DEBORAH R. BRONNER SBN: 130306
1999 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
(310) 572-1992

Attorneys for Plaintiff
JOHN WOODRUFF KESSEL

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOHN WOODRUFF KESSEL, Plaintiff, vs. DAVID KEENE LEAVITT, an individual, AILEEN LEAVITT, an individual, KERRY LEAVITT, aka KAREN LEAVITT, an individual, and DOES 1 through 10, inclusive. Defendants	Case No.: COMPLAINT TO SET ASIDE FRAUDULENT TRANSFER AND FOR DAMAGES [CC §3439.07]

Plaintiff alleges:

FIRST CAUSE OF ACTION

(To Set Aside Fraudulent Transfers
Against All Defendants)

1. Plaintiff is informed and believes that defendant David Leavitt and Aileen Leavitt are husband and wife

and Kerry Leavitt, aka Karen Leavitt, is defendant David Leavitt's and defendant Aileen Leavitt's daughter.

2. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants named herein as DOES 1 through 10 inclusive, are unknown to plaintiff, who, therefore, sues such defendants by fictitious names. Plaintiff is informed and believes and thereupon alleges that each such DOE-defendant participated in, and is responsible for the acts and conduct alleged herein. Plaintiff is informed and believes and thereupon alleges that each defendant so referred to herein is responsible in some manner for the acts, omissions, occurrences, and damages alleged herein. Plaintiff will amend this Complaint to show such true names and capacities when they have been fully ascertained.

3. From and after December 7, 1995, plaintiff has been the holder of a certain claim against defendant David Keene Leavitt. This claim consists of a judgment rendered in the State of West Virginia in the amount of $6,966.687.47 attached hereto as EXHIBIT A. This judgment was entered in California on March 6, 1996 in the amount of $7,113,916.97, attached hereto as EXHIBIT B.

4. On March 12, 1996, defendant David Leavitt was served with a copy of an Application for Entry of Judgment On Sister State Judgment and Notice of Entry of Judgment on Sister State Judgment. On or about April 12, 1996, defendant David Leavitt brought a motion to vacate the California judgement. On August 9, 1996, Honorable Judge Lorna Parnell denied defendant's motion to vacate the judgment and ordered that enforcement against

defendant David Leavitt be stayed only if defendant David Leavitt posted a bond in the amount of $2,000,000. To date, defendant David Leavitt has not posted any bond and no part of the judgment has been satisfied.

5. Up until April and May of 1996, defendant David Leavitt was the owner, or part owner, of various parcels of real property in Los Angeles and San Bernardino counties. As set forth below, these properties were transferred and/or transmuted to avoid, hinder or defraud plaintiff's attempt to enforce the judgment as aforesaid.

6. Plaintiff is informed and believes that the following property was held as defendant David Leavitt's separate property until on or about April 1, 1996 and is described as follows:

A) 2160 Century Park East, Unit 502 North, Los Angeles, California and also described as Lot 1 of Tract No. 31411, as per Map recorded in Book 830 pages 84 and 85 Book of Maps;

B) 148 Crescent Drive, Beverly Hills, California and also known as Lot 1 of Tract No. 36401 as per Map recorded in Book 935 pages 82 and 83 Book of Maps.

Plaintiff is informed and believes and thereon alleges that on or about April 2, 1996, defendant David Leavitt recorded a transfer of the above described properties via quitclaim deeds, copies of which are attached hereto as EXHIBITS C and D. Defendant David Leavitt transferred the properties described in this paragraph by quitclaim deed to defendant Aileen Leavitt. On June 7, 1996, defendant Aileen Leavitt recorded a deed of trust reflecting that she had obtained a loan in the amount of $165,000.00

secured by the property located at and described above as 148 Crescent Drive, Beverly Hills, California. A copy of the deed of trust is attached hereto as EXHIBIT I.

7. Plaintiff is informed and believes that the following property was owned by defendants David Leavitt and Aileen Leavitt as community property until on or about May 12, 1996:

C) 237 Almont Drive, Beverly Hills California and also described as Lots 265 and 266 of Tract No. 7005 as per Map recorded in Book 72, page 28 of Maps. On or about May 13, 1996, the defendants' interest in this property was transmuted to the undivided sole and separate property of defendants David Leavitt and Aileen Leavitt via quitclaim deed, a copy of which is attached hereto as Exhibit E.

8. Plaintiff is informed and believes that the following property was held by defendants David Leavitt and Aileen Leavitt as tenants in common until on or about April 1, 1996:

D) 2170 Century Park East, #1203, Los Angeles, California and also described as an undivided .1608 interest in Lot 1 of Tract No. 31411 as per map recorded in Book 830, pages 84 and 85 of Book of Maps. Plaintiff is informed and believes and thereon alleges that on or about April 2, 1996, defendants David Leavitt and Aileen Leavitt transferred by quitclaim deed the property described in this paragraph to defendant Kerry Leavitt without consideration. A copy of said quitclaim deed is attached hereto as EXHIBIT F.

9. Plaintiff is informed and believes that the following property was held in part by defendants David Leavitt and Aileen Leavitt as community property until on or about December 21, 1995:

E) 8327 Ridpath Drive, Los Angeles, California, and also described as Lot 15 in Block 63 of Tract 2042 as per Map recorded in Book 21, page 156 of Maps;

F) 8329 Ridpath Drive, Los Angeles, California, and also described as Lot 15 in Block 63 of Tract 2042 as per Map recorded in Book 21, page 156 of Maps.

Plaintiff is informed and believes that defendants David Leavitt and Aileen Leavitt conspired by recording a document entitled Agreement Converting Community Property to Tenancy in Common with the Recorder's Office in Los Angeles County, two weeks after the rendering of the West Virginia judgment, described in Paragraph 3 above, to fraudulently transmute the property identified in this paragraph (9) from community property to the separate property of said defendants. A copy of the said Agreement Converting Community Property to Tenancy in Common is attached hereto as EXHIBIT G.

10. Plaintiff is informed and believes that the following property was held by defendants David Leavitt and Aileen Leavitt as community property until on or about May 12, 1996:

G) Unit 51, Edgewater Shores Condominiums, 184 South Highway 73, Lake Arrowhead, County of San Bernardino, California, also described as Lot 51, Tract 8650 as per Map recorded in Book 117, pages 97-100. This property was transmuted via quitclaim deed on or about

May 13, 1996 into the separate property of defendants David Leavitt and Aileen Leavitt. A copy of the quitclaim deed is attached hereto as EXHIBIT H.

11. Plaintiff is informed and believes and thereon alleges that the aforementioned transfers and transmutations were made with the actual intent to hinder, delay or defraud creditors, including plaintiff in the collection of his judgment.

12. The aforementioned transfers were all conveyed as gifts to "insiders" and defendant David Leavitt did not receive reasonably equivalent value in exchange for the property. The aforementioned transfers occurred shortly after defendant David Leavitt was served with Notice of Application for Entry of Sister State Judgment on March 12, 1996, or in the case of the Ridpath properties, described in paragraph 9 above, the aforesaid transmutations were made shortly after a judgment was entered against defendant David Leavitt in West Virginia.

13. Plaintiff is informed and believes and thereon alleges that the above-described property was received by defendants Aileen Leavitt and Kerry Leavitt with the knowledge that defendant David Leavitt intended to hinder, delay, or defraud the collection of plaintiff's aforementioned judgment.

SECOND CAUSE OF ACTION

(Conspiracy Against all Named Defendants)

14. Plaintiff refers to and incorporates herein by reference paragraphs 1 though 13 inclusive.

15. As alleged above, defendants knowingly and willfully conspired between themselves to hinder, delay, and defraud plaintiff in the collection of his judgment against defendant David Leavitt.

16. Under this conspiracy, the above-named defendants agreed defendants Aileen, and Kerry Leavitt with respect to 2170 Century Park East, Unit 1203, would take as gifts and without consideration, as their sole and separate property, the aforementioned properties so that plaintiff could not satisfy the judgment awarded against David Leavitt.

17. Also under this conspiracy, defendants David Leavitt and Aileen Leavitt knowingly and willfully transmuted property from community property to separate property to effectively cut plaintiff off from the ability to satisfy his judgment as to half the property that was transferred to defendant Aileen Leavitt.

18. Further, defendant Aileen Leavitt, on June 7, 1996, obtained a loan in the amount of $165,000.00 secured by a Deed of Trust against the property located at and described above as 148 Crescent Drive, Beverly Hills, California. By doing so, Aileen Leavitt knowingly and willfully reduced the value of the property that was previously fraudulently conveyed by defendant David Leavitt and in violation of an agreement reached in open court on May 15, 1996, in the presence of defendants David Leavitt and Aileen Leavitt, wherein defendant David Leavitt, through counsel, agreed not to transfer or secret assets prior to the court's ruling on defendant's Motion to Vacate Judgment. A copy of the Deed of Trust is attached hereto as EXHIBIT I.

19. Defendants Aileen Leavitt, Kerry Leavitt and David Leavitt did the acts and things herein alleged pursuant to, and in furtherance of, the conspiracy and agreement alleged above.

20. As a proximate result of the wrongful acts alleged herein, plaintiff has been generally damaged in the sum of $2,000,000.00.

21. At all times mentioned herein, defendants Aileen Leavitt and Kerry Leavitt knew of plaintiff's claim against David Leavitt and knew that the claim could be satisfied by the aforementioned real property. Notwithstanding this knowledge, defendants Aileen Leavitt and Kerry Leavitt intentionally, willfully, and maliciously did the things herein alleged to defraud and oppress plaintiff. Plaintiff is therefore entitled to exemplary or punitive damages according to proof.

Wherefore, plaintiff prays judgment as follows:

On the First Cause of Action:

1. That the transfers from defendant David Leavitt to defendants Aileen Leavitt and Kerry Leavitt be set aside and declared void as to the plaintiff herein to the extent necessary to satisfy plaintiff judgment in the sum of $7,113,916.97 plus interest thereon at the rate of 10% per annum from March 6, 1996;

2. That an order pendente lite be granted plaintiff enjoining and restraining defendants Aileen Leavitt and Kerry aka Karen Leavitt and her representatives, attorneys, servants, and agents from selling, transferring, conveying, assigning or otherwise disposing of any of the property transferred;

3. That the judgment herein be declared a lien on the property transferred;

4. That an order be made declaring that defendant holds the same interest he held in each of the properties prior to the wrongful transfers as aforesaid;

5. That defendants Aileen Leavitt and Kerry Leavitt, aka Karen Leavitt, be required to account to plaintiff for all profits and proceeds earned from or taken in exchange for the property described above;

On the Second Cause of Action against defendants, and each of them, as follows:

6. For general damages in the amount of $2,000,000.00;

7. For special damages in the among [sic] according to proof;

8. For punitive damages in an amount according to proof; On all causes of action:

9. For costs of suit herein incurred;

10. For attorneys' fees; and

11. For such other and further relief as the court may deem proper.

Dated: August 22, 1996

LAW OFFICES OF DOBRIN
& BRONNER

By: /s/ Brian L. Dobrin
Brian L. Dobrin
Attorneys for Plaintiff
John Woodruff Kessel

DOBRIN & BRONNER
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DEBORAH R. BRONNER SBN: 130306
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(310) 572-1992

Attorneys for Plaintiff
JOHN WOODRUFF KESSEL

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOHN WOODRUFF KESSEL, Plaintiff, vs. DAVID KEENE LEAVITT Defendant.	Case No.: SS 006478 OBJECTIONS TO DEFENDANT'S PROPOSED ORDER AND REQUEST FOR FINDING OF FACT UNDER CCP §§1710.40(c), 632 [CRC §391]

TO THE ABOVE-ENTITLED COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that plaintiff JOHN WOODRUFF KESSEL hereby objects to defendant's proposed order submitted on or about November 5, 1996, on the grounds that it does not accurately reflect the Court's ruling of November 4, 1996 on defendant's Motion to Vacate Judgment or in the Alternative for Stay of Enforcement.

On November 4, 1996, the Court ruled as follows:

1. California does not have to afford the West Virginia Sister State judgment full faith and credit under the United States Constitution because the West Virginia judgment is not res judicata under the laws of West Virginia because it is pending appeal in West Virginia;

2. The issue of whether the Circuit Court of Cabell County had personal jurisdiction over defendant DAVID KEENE LEAVITT may be reexamined by this Court because the Sister State Judgment is not res judicata in West Virginia;

3. The Circuit Court of Cabell County West Virginia did not have personal jurisdiction over defendant DAVID KEENE LEAVITT;

4. The above rulings are made without prejudice to plaintiff JOHN WOODRUFF KESSEL's right to re-enter the Sister State West Virginia judgment in California upon that judgment having res judicata effect as defined by West Virginia law.

FURTHER, this Court heard defendant's motion *de novo* and, accordingly, it is improper to rule on the motion as if it were a "Motion to Reconsider."

FURTHER, plaintiff JOHN WOODRUFF KESSEL request [sic] this Court under CCP §§1710.40(c) and 632 to issue a finding of fact and law regarding the disputed nature of defendant DAVID KEENE LEAVITT's contacts with West Virginia;

FURTHER, plaintiff JOHN WOODRUFF KESSEL objects to name and address of defendant DAVID KEENE

LEAVITT's law firm printed on the order, which is a violation of L.A.Sup.Ct. Rule 3.0(1).

Dated:
November 6, 1996

LAW OFFICES OF DOBRIN & BRONNER

By /s/ Brian L. Dobrin
BRIAN L. DOBRIN
Attorneys for Plaintiff,
John Woodruff Kessel

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action. My business address is 1999 Avenue of the Stars, Suite 2800, Los Angeles, California, 90067.

On November 7, 1996, I caused the attached document(s) described as OBJECTIONS TO DEFENDANT'S PROPOSED ORDER AND REQUEST FOR FINDING OF FACT UNDER CCP §§1710.40(c), 632 on interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

Robert M. Turner, Esq.
Larry R. Feldman, Esq.
Fogel, Feldman, Ostrov, Ringler & Klevins
1620 26th Street, Suite 100 South
Santa Monica, California 90404-4040

(X) (BY MAIL) I caused such envelopes with postage thereon fully prepaid to be placed in the United States Mail at Los Angeles, California. I am an active member of the State Bar of California. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice such correspondence would be deposited with the U.S. Postal Service on the same day with the postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

( ) (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the residence of the addresses.

( ) (BY MESSENGER) By entrusting such envelope to a professional messenger service to effect personal service and delivery.

(X) (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

( ) (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 7, 1996, at Los Angeles, California.

/s/ Brian L. Dobrin
Brian L. Dobrin

BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
NO. 961098

JOHN WOODRUFF KESSEL, and
RAY MILLER KESSEL,

Plaintiffs,

v.

DAVID KEENE LEAVITT,
ANNE GILMORE CONATY,
ELEANOR WOLFE CONATY,
THOMAS J. CONATY, and
BRIAN P. CONATY,

Defendants.

PLAINTIFFS/APPELLEES' MOTION TO DISMISS APPEAL OF DEFENDANT LEAVITT

(Filed Mar. 11, 1997)

TO THE HONORABLE JUSTICES OF THE WEST VIRGINIA SUPREME COURT OF APPEALS:

Now come plaintiffs/appellees in the underlying civil action and move the Court to dismiss the appeal of defendant/appellant David Keene Leavitt pursuant to previous order of this Honorable Court entered on February 6, 1997, for the following reasons:

1. Defendant/appellant Leavitt has failed and refused to post bond pursuant to this Court's order of February 6, 1997.

2. Defendant/appellant has never filed with the Circuit Court of Cabell County, West Virginia, or this

Honorable Court any motion or pleading requesting any alternative bond or means of providing security for the judgment granted by the Circuit Court of Cabell County, West Virginia, on December 7, 1995, and which is the subject of this appeal, nor has defendant filed verified documentation of his assets in this Court.

3. Since the briefing and argument concerning the plaintiff/appellee's motion to require reasonable bond and security as a condition to prosecuting the appeal, the California Court has granted defendant Leavitt's demurrer to plaintiff's fraudulent conveyance action (based upon the prior ruling of the California Court vacating plaintiff's judgment allegedly for lack of personal jurisdiction).

4. Further, defendant argued to this Court that plaintiff has security for the judgment in California because plaintiff has filed lis pendens against defendant's property. However, the lis pendens which were based upon the fraudulent transfer action are now in jeopardy and plaintiff has been threatened with a lawsuit in California if he attempts to protect the liens by filing a writ to the California Appellate Court. (See attached letter dated February 26, 1997, from Boyd Lemon, attorney for Leavitt, to Brian Dobrin, attorney for plaintiff, John Kessel.)

Therefore, the defendant having made no offer of security whatsoever, and having posted no bond whatsoever, plaintiff respectfully moves this Honorable Court to dismiss the appeal of David Keene Leavitt for failure to comply with this Court's order dated February 6, 1997.

Respectfully submitted,

JOHN WOODRUFF KESSEL, and
RAY MILLER KESSEL

By Counsel

/s/ Marvin W. Masters
Marvin W. Masters
Paula L. Wilson
Masters & Taylor, L.C.
181 Summers Street
Charleston, West Virginia 25301
Counsel for Plaintiffs

LAW OFFICES OF
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BOYD S. LEMON
C. KELLY McCOURT
ERIC C. BRONSON

CENTRAL CALIFORNIA OFFICE
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SUITE 504
ILLEGIBLE, CALIFORNIA [ILLEGIBLE]
TELEPHONE (805) [ILLEGIBLE]
FACSIMILE (805) [ILLEGIBLE]

February 26, 1997

VIA FACSIMILE AND U.S. MAIL

Brian L. Dobrin, Esq.
Dobrin & Bronner
1999 Avenue of the Stars
Suite 2800
Los Angeles, CA 90067-6082

Re: Kessel v. Leavitt

Dear Mr. Dobrin:

I have received your letter of February 26, 1997 regarding *Code of Civil Procedure* Sections 405.35 and 405.39. Although you correctly described some of the provisions in those sections regarding the effectiveness of an order expunging notices of pending action, a Petition for Writ of Mandate in this case would be totally frivolous and in bad faith. As you know, in order to avoid expungement you had the burden of proof to show a likelihood of success on the merits of the fraudulent conveyance action. The Court ordered the fraudulent conveyance action dismissed. Therefore, there is no longer any basis for the existence of a lis pendens unless and until the Court's order of dismissal is reversed on appeal. In other words, once the Court decided to dismiss the fraudulent conveyance action, it was required to expunge the lis pendens.

Your client and his counsel are already liable to the Leavitts for damages caused by wrongful lis pendens, including, but not limited to, loss of rental income due to an inability to repair serious rain and wind damage to one of their buildings and severe emotional distress suffered by the Leavitts as a result of having virtually all of

their assets unavailable to them. You now have the opportunity to stop those damages from continuing. If, however, you file a Petition for Writ of Mandate and cause the lis pendens to continue in effect, the damage to the Leavitts caused by the wrongful lis pendens will continue to occur and will increase.

Please take notice that if you file a Petition for writ of Mandate, which would be a frivolous bad faith attempt to continue to tie up the Leavitts' property, the Leavitts will file an action against your client and his counsel for malicious prosecution and all other appropriate causes of action, and the damages will be very substantial.

I suggest that you do appropriate legal research and also consult with independent counsel to advise you. You and independent counsel should be able to conclude that a Petition for Writ of Mandate would be totally without merit, because the action in which it was filed has been dismissed. You can pursue an appeal of the order of dismissal, but you have no right to a Writ of Mandate to vacate the expungement of the lis pendens, when the action in which it was filed has been dismissed, and therefore there can be no likelihood of success on the merits, unless and until there is a reversal on appeal.

I hope that you realize the seriousness of this matter, both to yourself and your client and do not take the filing of a Petition for Writ of Mandate lightly. You can be

assured that my clients will prosecute appropriate actions against your client and his counsel to their conclusion.

Very truly yours,

/s/ Boyd S. Lemon

BSL/bjr

IN THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

NO. 961098

JOHN WOODRUFF KESSEL, and
RAY MILLER KESSEL,

Plaintiffs,

v.

DAVID KEENE LEAVITT,
ANNE GILMORE CONATY,
ELEANOR WOLFE CONATY,
THOMAS J. CONATY, and
BRIAN P. CONATY,

Defendants.

CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for plaintiffs, do hereby certify that a true and exact copy of the foregoing "Plaintiffs/Appellees' Motion to Dismiss appeal of Defendant Leavitt" was served upon:

Lonnie C. Simmons
DiTrapano & Jackson
604 Virginia Street, East
Charleston, West Virginia 25301

by hand delivering same this 11th day of March, 1997.

/s/ Marvin W. Masters
Marvin W. Masters

Second Appellate District, Division One,
No. B108792/B110750
S072165

IN THE SUPREME COURT OF CALIFORNIA

JOHN WOODRUFF KESSEL, Appellant

v.

DAVID KEENE LEAVITT Et Al., Respondents

(Filed Oct. 14, 1998)

Respondents' petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

Respondent's request to take judicial notice granted.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed June 15, 1998, which appears at 64 Cal.App.4th 1087. (Cal. Const., art. VI, section 14, rule 976, Cal. Rules of Court.)

Kannard, J., is of the view the opinion should remain published.

GEORGE
Chief Justice

Filed 6/15/98

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION ONE

JOHN WOODRUFF KESSEL, Plaintiff and Appellant, v. DAVID KEENE LEAVITT, et al., Defendants and Respondents.	))))))))	B108792 c/w B110750 (Super. Ct. Nos. SS 006478 and SC 043857)

APPEALS from an order and judgment of the Superior Court of Los Angeles County. Alan B. Haber and Robert M. Letteau, Judges. Reversed.

Dobrin & Bronner, Brian L. Dobrin and Deborah R. Bronner; Lascher & Lascher and Wendy C. Lascher for Plaintiff and Appellant.

Horvitz & Levy, Ellis J. Horvitz and Stephanie Rae Williams; Fogel, Feldman, Ostrov, Ringler & Klevens, Larry R. Feldman, Robert M. Turner and Toni L. Martinson; Boyd S. Lemon for Defendants and Respondents.

Academy of California Adoption Lawyers, Jane A. Gorman and David H. Baum as Amici Curiae on behalf of Respondent David Keene Leavitt.

This appeal involves a California attorney's (defendant) manipulation of different state and foreign adoption notice requirements to help an unmarried and pregnant West Virginia client arrange a private adoption in a jurisdiction that, unlike West Virginia, required no notice to the biological father (plaintiff). Defendant's client sought to keep plaintiff, who had filed a West Virginia paternity action, from locating his newborn child or intervening in the adoption proceeding. Defendant arranged for a private Canadian adoption in defiance of a West Virginia temporary injunction prohibiting his client from placing the child for adoption while plaintiff's paternity action was pending. Defendant allowed the prospective adoptive parents to withhold plaintiff's name and misinform the Canadian adoption court that there were no other custody actions involving the child. When plaintiff sued defendant in California to find his child and learn where the adoption was taking place, defendant withheld that information, citing the attorney-client privilege. After finally discovering the information through other means, plaintiff filed a Canadian paternity action but was unable to derail the adoption.

Plaintiff sued defendant in West Virginia for intentional interference with parental relations and fraudulent concealment. Defendant specially appeared to contest West Virginia's personal jurisdiction, but lost. Following a jury trial, defendant suffered a $7 million judgment, which he appealed to the West Virginia Supreme Court of Appeals.

Under West Virginia law, the judgment remained enforceable during appeal because defendant failed to file the $7 million supersedes bond set by the trial court. While the appeal was pending, plaintiff sought to enforce the judgment in California by registering it under the 1974 Sister State Money-Judgments Act (Code Civ. Proc., § 1710.10 et seq.).[1] Defendant, who was entitled to a stay of the California enforcement proceeding pending appeal (§ 1710.50, subd. (a)), moved instead to vacate the judgment in California (§ 1710.40), claiming it was void for lack of personal jurisdiction. The California trial court vacated the judgment after concluding West Virginia lacked personal jurisdiction over defendant.

As will be explained below, the California enforcement proceeding should have been stayed pending appeal and the judgment should not have been vacated. When the West Virginia Supreme Court of Appeals learned of the California trial court's erroneous decision to vacate the West Virginia judgment, the West Virginia court ordered defendant to post a $1.1 million appeal bond or have his appeal dismissed. Defendant failed to post the bond, and his appeal, which had been fully briefed and argued, was dismissed. Defendant petitioned for certiorari before the United States Supreme Court, but the petition was denied. The West Virginia judgment is now final for res judicata purposes.

Two consolidated appeals are before us. In proceeding No. B108792, plaintiff appeals from the order vacating

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[1] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

the West Virginia judgment for lack of personal jurisdiction. We reverse the order and reinstate the judgment in Kessel v. Leavitt (Super. Ct. L.A. County, No. SS 006478).

In No. B110750, plaintiff appeals from the judgment of dismissal entered after demurrers were sustained without leave to amend on his complaint to set aside defendant's allegedly fraudulent transfers to his wife. We reverse the judgment of dismissal in Kessel v. Leavitt, et al. (Super. Ct. L.A. County, No. SC 043857).

BACKGROUND

The biological father, plaintiff John W. Kessell, M.D., then a West Virginia resident, repeatedly tried to stop his former girlfriend, Anne Conaty, also a West Virginia resident, from placing their unborn child for adoption. On June 3, 1991, plaintiff filed a paternity action in West Virginia, where the child had been conceived in October 1990. Plaintiff secured a temporary injunction prohibiting Conaty from placing their unborn child for adoption while his paternity action was pending.[2]

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[2] Plaintiff had difficulty serving the summons and complaint on Conaty because she left the state without telling him her whereabouts. Plaintiff attempted personal service on Conaty at her home in Huntington, West Virginia, but her brother, Brian Conaty, a West Virginia attorney who also lives in Huntington, refused to accept service. Plaintiff also had the court clerk attempt service by mail on Conaty at her home in Huntington, but the envelope came back marked, " 'Return to Sender.' " Ultimately, plaintiff resorted to service by publication, a process that was not completed until July 26, 1991, two days after the child was born and one day after Conaty had placed the child for adoption in California.

Conaty, however, had already left West Virginia and hired a California adoption attorney, defendant David W. Leavitt, in April 1991, to arrange a private adoption in a jurisdiction that, unlike West Virginia, did not require notice to the birth father. Defendant advertised for interstate adoptions "in the 'Adoption Services' section of the 'AT&T Toll-Free 800 Directory[,'] which is distributed throughout the United States, as well as in over two hundred local directories," including the local directory for the area where plaintiff and Conaty lived.

Upon defendant's advice, Conaty traveled to California in June 1991 to give birth in Los Angeles. At the time, California's statutory scheme allowed unwed mothers, in violation of the biological father's constitutional rights, "unilaterally to preclude her child's biological father from becoming a presumed father and thereby allowing the state to terminate his parental rights on nothing more than a showing of the child's best interest." (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849.)[3] Aware of plaintiff's

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Plaintiff mailed a copy of the summons and complaint to Conaty's West Virginia attorney, David J. Lockwood, who faxed them to defendant. Lockwood appeared at the temporary injunction hearing, but told the court that he was not Conaty's attorney. The West Virginia trial court excused him from the hearing.

[3] The California Supreme Court found former Civil Code section 7004 (repealed in 1993) to be unconstitutional in 1992, one year after plaintiff's child was placed for adoption without his knowledge and consent. In 1992, the court in *Kelsey S.* held: "In summary, we hold that [former Civil Code] section 7004, subdivision (a) and the related statutory scheme violates the federal constitutional guarantees of equal protection and due process for unwed fathers *to the extent that* the statutes allow a

pending paternity action, defendant nevertheless had Conaty place the child for adoption in California the day after the child's birth on July 24, 1991, without notifying plaintiff. In addition, defendant selected Canadian clients, the Holmstroms, as prospective adoptive parents. Defendant selected the Holmstroms because they lived in a jurisdiction that limits the biological father's right to notice in adoption proceedings. According to defendant, the applicable Canadian law does not require prospective adoptive parents to name the biological father when that information is withheld by the birth mother.[4]

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mother unilaterally to preclude her child's biological father from becoming a presumed father and thereby allowing the state to terminate his parental rights on nothing more than a showing of the child's best interest. If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities – emotional, financial, and otherwise – his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother." (*Adoption of Kelsey S., supra,* 1 Cal.4th at p. 849, fn. omitted.)

[4] Defendant's earlier attempt to arrange an Oregon adoption failed when the prospective adoptive parents, the Haeners, became fearful that plaintiff would intervene. In June 1991, defendant asked the Haeners, who had previously adopted a child through his office, if they would adopt a child from a single birth mother who was estranged from the birth father. Defendant informed the Haeners of the birth father's opposition to the adoption. Upon consulting an attorney, the Haeners learned that under the circumstances, the birth father would not be entitled to notice of adoption proceedings under Oregon law, but he could intervene and delay the proceedings.

Plaintiff eventually learned, through his own efforts, of his son's birth. Seeking legal advice on which states limit the biological father's rights in adoption proceedings, plaintiff coincidentally called defendant's office on August 2, 1991, and spoke to defendant. Defendant told plaintiff that he was representing Conaty. Defendant refused, however, to divulge to plaintiff "the whereabouts of [Conaty] and the child. I did not deny that I had the information he sought, and I did not give him any incorrect information. I told him that, since I had acted as [Conaty's] attorney in the adoption, I was prohibited by the attorney-client privilege from discussing the matter with him. I also knew that his status as unwed father of the baby, if that was his status, did not confer any duty on me to give him the information he wanted."

On August 6, 1991, plaintiff's West Virginia attorney, Cheryl Eifert, called defendant and informed him of the paternity action and temporary injunction prohibiting Conaty from placing the child for adoption while the paternity action was pending. Defendant again refused to disclose Conaty's or the baby's whereabouts.

On August 6, 1991, defendant forwarded to Shaw, the Holmstroms' Canadian adoption attorney, the necessary signed consents for the Canadian adoption proceeding to be filed.

Unwilling to take that risk, the Haeners declined the adoption offer. Defendant then looked in Canada for prospective adoptive parents because he knew it would be more difficult for plaintiff to intervene in certain Canadian jurisdictions.

On August 9, 1991, defendant received from Eifert a copy of the West Virginia court's temporary injunction. In her accompanying letter, Eifert told defendant in part, "I believe that as an officer of the Court you have an obligation to advise Ms. Conaty, her family, prospective adopting parents, and the Court of this Temporary Injunction."

By letter dated August 9, 1991, plaintiff's California attorney, Harold J. Cohn, informed defendant of the West Virginia temporary injunction and of plaintiff's refusal, under former Civil Code section 7017, to consent to the adoption of his child. Cohn demanded that defendant immediately provide information regarding "any adoption proceeding, in any State or country, that you may have facilitated, participated in, or aided."

By return letter to Cohn dated August 9, 1991, defendant refused to provide the requested information, claiming the attorney-client privilege. Defendant indicated he would forward Cohn's letter to Conaty's West Virginia attorney.

On August 15, 1991, the Holmstroms filed an affidavit in support of their guardianship application before the Court of Queen's Bench of Alberta, Canada, where Mr. Holmstrom is a barrister and solicitor. In their affidavit, the Holmstrom's attested that Conaty had refused to divulge the birth father's identify, and to the best of their knowledge, no one else had filed an application for guardianship or custody of the child.

By letter dated August 20, 1991, plaintiff's West Virginia attorney, John M. Poma, requested that defendant inform Conaty of the West Virginia temporary injunction and have her contact the West Virginia court immediately.

The letter stated, "please advise your client(s) that Judge Holliday has found Dr. Thomas J. Conaty [Conaty's father] and Mrs. Eleanor Wolfe Conaty [Conaty's mother] to be in civil contempt of a duly processed and properly served Subpoena. Judge Holliday ordered their immediate return to the State of West Virginia to appear for testimony." In addition, the letter requested that defendant disclose the name of Conaty's West Virginia attorney.

In reply, defendant told Poma that he did not know the whereabouts of Conaty or her parents, and that he was unaware of the name of Conaty's West Virginia attorney. The record indicates, however, that defendant knew counsel's name. In his files, defendant had listed Lockwood as Conaty's West Virginia attorney, with Lockwood's phone number and the notation: " 'It's okay for him to know everything.' " Moreover, on August 21, 1991, defendant faxed to Lockwood a letter containing legal advice on the attorney-client privilege.

Plaintiff filed several California actions in late 1991 to discover his child's whereabouts and the jurisdiction in which the adoption proceeding was pending. The actions included a complaint to establish parental relationship (L.A. County Super. Court No. BF 001705), and a tort action against defendant and Conaty for conspiracy, fraud, intentional infliction of emotional distress, negligent infliction of emotional distress, and child abduction (L.A. County Super. Court No. BC 043140). Plaintiff noticed defendant's deposition for November 27, 1991, under Los Angeles County Superior Court case number BS 011474 (the record on appeal sheds no further light on the nature of that proceeding).

On October 3, 1991, Judge Holliday of the Circuit Court of Cabell County, West Virginia, entered a judgment of paternity for plaintiff. The paternity judgment stated that service by publication upon Conaty had been completed on July 26, 1991. The paternity judgment further indicated the testimony of Conaty's parents and employer had corroborated plaintiff's testimony that he was the child's biological father.

During discovery in the California litigation, defendant refused to divulge the child's whereabouts or provide any information about the adoption proceedings, claiming the information was protected by the attorney-client privilege. Defendant also testified in his deposition that he was unaware of any adoption proceedings. The record showed, however, that defendant was simultaneously helping the adoptive parents' Canadian attorney expedite the Canadian adoption proceedings.[5] After the California trial court upheld defendant's claim of privilege, plaintiff dismissed the California litigation without seeking appellate review of the order upholding

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[5] Defendant's deposition occurred on November 27, 1991. On October 22, 1991, however, defendant had sent the Holmstroms' attorney, John Shaw, a photocopy of the child's birth certificate, stating, "The photocopy is attached in the hope that it may expedite a final adoption hearing." On October 24, 1991, defendant had sent Shaw a certified copy of the birth certificate, stating: "At last! Here is the certified copy of the birth certificate. You may wish to finalize the adoption expeditiously!" And immediately following his deposition on November 27, defendant sent a message to Brian Conaty emphasizing the importance of keeping plaintiff and his attorneys "from learning any more than they know already for another month if possible."

defendant's attorney-client privilege to withhold the child's whereabouts and information concerning the adoption proceedings.[6]

Upon finally discovering his child's whereabouts in January 1992, plaintiff filed a paternity action in Canada. The Canadian court, however, terminated his parental rights without his consent. The adoption was finalized.

Plaintiff then filed a tort action against defendant in West Virginia in July 1992. Plaintiff sued defendant, Conaty, Conaty's parents, and Conaty's brother for intentional interference with parental relations and fraudulent concealment.[7]

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[6] The discovery order was not appealed. The fact that the trial court refused to require defendant to divulge the information does not mean the ruling would have been upheld on appeal.

[7] Conaty's parents, Eleanor and Thomas J. Conaty, M.D., are Huntington, West Virginia residents. On May 16, 1991, Eleanor Conaty sent defendant a photo of Conaty and plaintiff. The photo was intended to be shown to their grandchild's prospective adoptive parents.

On May 21, 1991, Brian Conaty faxed defendant a copy of a May 1, 1991, letter form plaintiff's West Virginia attorney, Eifert, to Conaty's West Virginia attorney, Lockwood. In the letter, Eifert communicated plaintiff's desire for the child to live either with one or both parents, and his refusal to consent to adoption. Eifert stated that if Conaty refused either to be reconciled with plaintiff or take custody of the child herself, then plaintiff wanted custody of the child. In his cover letter to defendant, Brian Conaty stated that "Lockwood did not respond [to Eifert's May 1 letter] as he did not want service of process on him of any claim." Brian Conaty also informed defendant that he had checked the courthouse "again" and found "[n]o suits or notice."

Defendant specially appeared and moved to dismiss the West Virginia tort action for lack of personal jurisdiction. Defendant claimed he is a California resident who does not conduct business in West Virginia. The West Virginia court, after considering evidence of defendant's national and West Virginia telephone directory advertisements for interstate adoptions, as well as his letters and phone calls to Conaty's family and attorney in West Virginia, concluded there were sufficient contacts for the state to acquire personal jurisdiction.[8]

Defendant reserved his jurisdictional objections and fully participated and testified in the West Virginia jury trial. The West Virginia jury found defendant 55 percent liable for plaintiff's damages under the fraud cause of action, and 35 percent liable under the tortious interference cause of action. The West Virginia jury awarded plaintiff $2 million in compensatory[9] and $5.85 million in punitive damages. Of the punitive damages, $5 million was awarded solely against defendant.[10]

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[8] West Virginia's long-arm statute provides for out-of-state service of process to be made on a non-resident defendant when, among other things, the defendant "caus[es] tortious injury in [West Virginia] by an act or omission outside [West Virginia] *if he regularly* does or *solicits business*, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in [West Virginia.]" (W. Va. Code, § 56-3-33 (1966).)

[9] The compensatory damage award consisted of $150,000 for costs and fees, $500,000 for past mental pain and suffering, $1 million for loss of society and companionship, and $350,000 for future pain and suffering.

[10] The remaining punitive damages award was divided as follows: $500,000 against Conaty's brother Brian, $250,000

In West Virginia, granting appellate review of circuit court decisions is within the discretion of the West Virginia Supreme Court of Appeals, the state's sole appellate court. Defendant, Conaty, Conaty's parents, and Conaty's brother all successfully sought leave to appeal. Defendant filed an appellate brief challenging West Virginia's personal jurisdiction, disputing the existence of a new cause of action for tortious interference with parental relations, arguing the constitutionality of the punitive damages award, and contesting the sufficiency of the evidence on the fraudulent concealment claim.

The Circuit Court of Cabell County set the amount of defendant's supersedeas bond to stay the judgment pending appeal at $7 million. Defendant, a California resident with no assets in West Virginia, decided not to post a bond or pledge assets, thereby waiving his right to obtain a stay of enforcement. His West Virginia codefendants, however, all pledged assets to obtain a stay of enforcement.

While defendant's appeal was pending in West Virginia, plaintiff sought to enforce the West Virginia judgment in California under section 1710.10 et seq. The Superior Court of Los Angeles County entered the sister state judgment while defendant's West Virginia appeal was pending.

Defendant moved to vacate the sister state judgment under section 1710.40, claiming the West Virginia judgment was void for lack of personal jurisdiction, and was

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against Conaty, $50,000 against Conaty's father Thomas, and $50,000 against Conaty's mother Eleanor.

not entitled to full faith and credit pending appeal. Initially, the California trial court ordered defendant to post a $2 million bond and issued a stay pending appeal. The trial court recused itself, however, before ruling on defendant's motion for reconsideration. The matter was reassigned and the new trial court, rather than staying enforcement of the sister state judgment pending appeal as required by section 1710.50, granted defendant's motion to vacate. The trial court relitigated defendant's lack of personal jurisdiction claim, found in his favor, and vacated the judgment. Plaintiff appealed from the order vacating the judgment. (No. B108792.)

Meanwhile, plaintiff informed the West Virginia Supreme Court of Appeals of the California trial court's refusal to recognize the West Virginia judgment for lack of personal jurisdiction. On January 15, 1997, plaintiff moved to require defendant to post a bond in West Virginia as a condition for maintaining the appeal. Plaintiff contended he had no security in West Virginia, since defendant had failed to post the $7 million supersedeas bond required by the West Virginia trial court to stay enforcement pending appeal. Moreover, plaintiff contended he could not enforce the judgment in California without first overturning the California trial court ruling vacating the judgment.

On January 16, 1997, the West Virginia Supreme Court of Appeals granted plaintiff's motion to require a bond, giving defendant ten days to post a $7 million bond or have his appeal dismissed.

On January 28, 1997, the West Virginia Supreme Court of Appeals heard oral argument on defendant's appeal.

On February 7, 1997, the West Virginia Supreme Court of Appeals granted defendant's motion for reconsideration of the January 16 bond order and reduced the amount of the bond to $1.1 million, due in 30 days. Defendant again moved for reconsideration, stating, "Defendants sincerely appreciate the fact that this Court decided to grant their first reconsideration motion with respect to the 'appeal bond' issue. However, Defendants' argument was not that the amount of the 'appeal bond' was too high, which it clearly was, but that this Court has no authority to require such an 'appeal bond.' " Defendant informed the court that a lis pendens had been recorded against his California real property in conjunction with plaintiff's fraudulent conveyance action against defendant and defendant's wife. (The lis pendens has since been set aside.) Defendant submitted a declaration stating his assets totaled only $672,000.

The West Virginia Supreme Court of Appeals denied defendant's second motion for reconsideration and, on March 30, 1997, dismissed defendant's appeal for failure to post a bond. Defendant petitioned the United States Supreme Court for certiorari, but the petition was denied. Accordingly, the West Virginia judgment is now final as to defendant.[11]

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[11] Apparently, the West Virginia Supreme Court of Appeals has yet to issue its decision in the appeal by Leavitt's West Virginia codefendants.

The appeal in No. B110750 pertains to plaintiff's fraudulent conveyance action against defendant and defendant's wife, Aileen Leavitt. The complaint sought to set aside defendant's allegedly fraudulent transfers of property to his wife following the West Virginia judgment. The trial court sustained defendants' demurrers to the fraudulent conveyance complaint without leave to amend, concluding the action was moot due to the order vacating the sister state judgment.

DISCUSSION

Plaintiff's petition to enforce the West Virginia judgment should have been stayed, and the judgment should not have been vacated, pending completion of the West Virginia appellate proceedings. The controlling statute is section 1710.50, subdivision (a)(1), which provides: "The court *shall* grant a stay of enforcement where . . . [a]n appeal from the sister state judgment is pending or may be taken in the state which originally rendered the judgment. Under this paragraph, enforcement *shall* be stayed until the proceedings on appeal have been concluded or the time for appeal has expired." (Emphasis added.) When the West Virginia judgment became final as to defendant, plaintiff should have been allowed to proceed with enforcement under the Sister State Money Judgments Act.

The court below erred in concluding the West Virginia appeal created a window of opportunity for defendant's collateral attack on the West Virginia jurisdictional

ruling under section 1710.40.[12] Although subdivision (a) of section 1710.40 permits a sister state judgment to be

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[12] Section 1710.40, subdivision (a) provides: "A judgment entered pursuant to this chapter may be vacated on any ground which would be a defense to an action in this state on the sister state judgment, including the ground that the amount of interest accrued on the sister state judgment and included in the judgment entered pursuant to this chapter is incorrect." The phrase, "defense to an action in this state on the sister state judgment," refers to the traditional method of enforcing sister state judgments that existed before the Sister State Money Judgments Act (§ 1710.10 et seq.) was passed. (See § 1913 [judicial record of sister state enforceable only by special proceeding or action].) The Sister State Money Judgments Act " 'provides a simpler and more efficient method of enforcing such judgments than the *traditional action* on the judgment. The registration procedure established by the act is designed to allow parties to avoid the normal trappings of an original action, e.g., the necessity for pleadings. The optional procedure was intended to offer savings in time and money to both courts and judgment creditors, yet, at the same time, remain fair to the judgment debtor by affording him the opportunity to assert any defense that he could assert under the traditional procedure. [Citations.]' [Citations.]" (*Silbrico Corp. v. Raanan* (1985) 170 Cal.App.3d 202, 206, fn.3.)

"In elaborating on the defense[s] available under section 1710.40, the Law Revision Commission makes the following comment: 'Common defenses to enforcement of a sister state judgment include the following: the judgment is not final and unconditional (where finality means that no further action by the court rendering the judgment is necessary to resolve the matter litigated); the judgment was obtained by extrinsic fraud; the judgment was rendered in excess of jurisdiction; the judgment is not enforceable in the state of rendition; the plaintiff is guilty of misconduct; the judgment has already been paid; suit on the judgment is barred by the statute of limitations in the state where enforcement is sought.' (19A West's Ann.

vacated "on any ground which would be a defense to an action in this state on the sister state judgment," the motion to vacate should not have been heard while the West Virginia appeal was pending. Because defendant received a full and fair hearing on the jurisdictional issue in West Virginia, the ruling should have been protected from collateral attack pending appeal.

Lack of personal jurisdiction in the forum state is a valid defense to an action on a sister state judgment, and, accordingly, is also a proper basis for vacating a judgment registered under the Sister State Money Judgments Act. But where the forum state fully and fairly litigated the defendant's jurisdictional objection, its final ruling is entitled to full faith and credit under the United States Constitution, article IV, section 1. "[A] judgment is entitled to full faith and credit – even as to questions of jurisdiction – when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." (*Durfee v. Duke* (1963) 375 U.S. 106, 111.)

"The constitutional command of full faith and credit, as implemented by Congress, requires that 'judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.' Full faith and credit thus generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in

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Codes (1982) p. 694. . . .)" (*World Wide Imports, Inc. v. Bartel* (1983) 145 Cal.App.3d 1006, 1009-1010.)

the State which rendered it. 'By the Constitutional provision for full faith and credit, the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence, and therefore federal questions. . . . ' [Citation.]" (*Durfee v. Duke, supra*, 375 U.S. at p. 109, fn. omitted.)

In *St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese* (1990) 223 Cal.App.3d 1354, the court stated: "Where another state has fully and fairly litigated its jurisdiction, and has finally decided the question, a second state may not reexamine the question but must give the judgment of the first state full faith and credit. [Citations.]" (*Id.*, at p. 1364, citing *Durfee v. Duke, supra*, 375 U.S. at p. 111; see *Thorley v. Superior Court* (1978) 78 Cal.App.3d 900, 906-909; *Craig v. Superior Court* (1975) 45 Cal.App.3d 675, 680.) This principle has been universally recognized and applied. (See, e.g., *Giehrl v. Royal Aloha Vacation Club* (1997) 188 Ariz. 456 [937 P.2d 378, 380]; *Thoma v. Thoma* (1996) 123 N.M. 137 [934 P.2d 1066; 1069]; *Reinwald v. Swiggett* (1992) 107 N.C.App. 590 [421 S.E.2d 367, 369-370]; *Packer Plastics, Inc. v. Laundon* (1990) 214 Conn. 52 [570 A.2d 687, 689-690]; *Corsica Cheese, Inc. v. Roers Enterprise* (1986 Minn. App.) 389 N.W.2d 751, 753-754; *Ross & Chatterton Law Offices v. Lewis* (1982) 109 Ill.App.3d 856 [441 N.E.2d 129, 130-131]; *L & W Air Cond. v. Varsity Inn of Rochester* (1975) 82 Misc.2d 937 [371 N.Y.S.2d 997, 999].)

The West Virginia judgment remained fully enforceable against defendant in West Virginia pending appeal because he did not obtain a stay or post a supersedeas bond. Nevertheless, enforcement in California under the Sister State Money-Judgments Act pending appeal should

have been stayed, regardless of defendant's failure to post a bond in West Virginia. A stay pending appeal is mandatory under the Act. "The Sister State Money-Judgments Act provides that where an appeal from a sister state judgment is pending or may be taken in the state that originally rendered the judgment, a stay *must* be granted. . . . " (8 Witkin, Cal. Procedure (4th ed. 1997) Enforcement of Judgment, § 415, p. 420.)[13]

Had the lower court stayed enforcement pending appeal, it would have allowed for a final jurisdictional ruling in West Virginia without doing violence to the full faith and credit clause. Defendant, having specially appeared to contest jurisdiction in West Virginia, was not entitled to relitigate his jurisdictional challenge here while simultaneously appealing the issue in West Virginia. His sole remedy was to appeal the issue in West Virginia and seek a stay of enforcement in California. (See *Thorley v. Superior Court, supra,* 78 Cal.App.3d at p. 909.)

Defendant relies heavily upon the fact the West Virginia judgment was not yet final when registered under the Sister State Money Judgments Act. Contrary to the

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[13] On the other hand, an independent action on a sister state judgment may be maintained "despite a pending [foreign] appeal, where there is no stay in the foreign appeal." (8 Witkin, Cal. Procedure, *supra,* § 415, p. 420, citing *Taylor v. Shaw* (1870) 39 Cal. 536, 539.) Since the West Virginia judgment remained fully enforceable pending appeal, plaintiff could have maintained an independent action on the judgment during the appeal. Although such an independent action could have been stayed pending appeal upon the filing of a sufficient bond (*Stevens v. Superior Court* (1972) 28 Cal.App.3d 1, 3), in this case no bond was filed in either West Virginia or California.

assertion of defendant and amicus curiae, the Academy of California Adoption Lawyers, plaintiff did not waive the right to have full faith and credit applied to the West Virginia judgment by seeking to enforce it while the West Virginia appeal was pending. Amicus Curiae states: "It is illogical to believe, and cannot have been intended by the legislature, that a defendant who successfully establishes 'a ground that would be a defense to an action in this state on the sister state judgment' when the California court is authorized to determine it, will nevertheless be wiped out upon later finalization in the forum state." Contrary to amicus' position, the appeal did not entitle the California trial court to entertain a collateral attack on the judgment. The California trial court was required, by Legislative mandate, to stay enforcement while the appeal was pending under section 1710.50, subdivision (a)(1), rather than dismiss the judgment under section 1710.40.

Defendant also contends he lacked sufficient minimum contacts with West Virginia to establish personal jurisdiction. We will not look behind the jurisdictional ruling. Once a fully and fairly litigated judgment becomes final in the sister state, the sister state's jurisdictional ruling is entitled to full faith and credit even if demonstrably wrong. "Suppose a *final decision on jurisdiction* has been made by a decision of the lower tribunal in favor of its jurisdiction, and the objecting party either has failed to seek a review of the determination by motion or appeal or otherwise, or has had such a review and the reviewing court has upheld the determination. If the matter involved is jurisdiction of the *person*, when the determination becomes final it may be res judicata and no

longer subject to attack, even though demonstrably wrong. The same reasons for application of the doctrine of res judicata apply here as in cases involving final determinations of substantive rights and liabilities. And, since jurisdiction of the person can be conferred by mere consent on a court which would otherwise have no such jurisdiction, it is not too great an additional step to hold that a party who litigates the question may be bound by the final determination of the court. [Citations.]" (2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 335, p. 922.)

Defendant contends the West Virginia judgment even though final, is not entitled to full faith and credit because the West Virginia Supreme Court of Appeals lacked statutory authority to dismiss his appeal for failure to post an appeal bond. Defendant concedes his appeal could have been dismissed under West Virginia law for not posting a supersedeas bond to obtain a stay of enforcement, but not for failing to post an appeal bond in the absence of a stay. Defendant asserts the dismissal for failing to post an appeal bond in the absence of a stay was unprecedented in West Virginia jurisprudence.

The West Virginia Supreme Court of Appeals' statutory authority to dismiss defendant's appeal for failing to post an appeal bond in the absence of a stay was fully, fairly, and finally litigated by both parties before the highest court of that State. Defendant may not collaterally attack that final determination. Although defendant's construction of the West Virginia statutes appears erroneous, we decline defendant's invitation to conduct our own analysis of the disputed statutes (W. Va. Code,

§§ 58-5-14, 58-5-16; W. Va. Rules of Court, Rules of Appellate Procedure, Rule 6).[14]

Defendant's right to appeal in West Virginia was, as defendant points out, purely discretionary. Had the West Virginia Supreme Court of Appeals denied defendant the right to appeal, the judgment would have been final and entitled to full faith and credit in California. Given the West Virginia Supreme Court of Appeal's control over the right to appeal, the right to dismiss defendant's appeal for failing to post an appeal bond was obviously within that court's discretion and jurisdiction. Moreover, the dismissal of defendant's appeal had no impact on the fullness or fairness of the West Virginia trial court's jurisdictional ruling. Defendant makes no specific allegations that the West Virginia trial court failed to give him a full and fair hearing. Although defendant asked us to take

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[14] West Virginia Code section 58-5-14 states in part: "When required by the court, an appeal shall not take effect until bond is given by the appellants . . . in a penalty to be fixed by the court . . . in which the appeal is allowed. . . . "

West Virginia Code section 58-5-16 states in part: "An appeal . . . shall be dismissed whenever it appears that two months have elapsed since the date when the appeal . . . was granted before such bond is given as is required to be given before the appeal . . . takes effect."

West Virginia Rules of court, Rules of Appellate Procedure, Rule 6(d) provides in part: "In civil cases relief available in the circuit court or the Supreme Court under this rule may be conditioned upon the filing of a bond or other appropriate security in the circuit court, in such amount and upon such conditions as the court granting the stay feels is proper for the protection of the adverse party. The provisions of W. Va. Code, 58-5-14, are applicable. . . . Failure to execute such bond may be grounds for the dismissal of the appeal."

judicial notice of certain remarks made before Congress by a West Virginia jurist regarding his perceptions of judicial bias against foreign litigants, those remarks have no specific relation to this case.

In any event, even if we accept defendant's characterization of the dismissal as unique or unprecedented under West Virginia law, that would not establish a constitutional violation. All courts possess the inherent power to protect and enforce their judgments and orders. As was stated "in *Teter v. George*, 86 W.Va. 454, 103 S.E. 275, 276, where the Court held: [¶] 'Courts have inherent power and authority to prescribe and enforce rules and regulations for the conduct of their business in accordance with established procedure, not inconsistent with organic or statutory law, nor unreasonable, oppressive, or obstructive of common right.' " (*State v. Davis* (1956) 141 W.Va. 488, 493 [93 S.E.2d 28, 31].) The West Virginia Supreme Court of Appeals exercised that inherent power by requiring, not unreasonably, a $1.1 million bond to protect a $7 million judgment that a California trial court had erroneously vacated. The West Virginia court was undoubtedly concerned the judgment, unless reinstated in California, would be unenforceable without a bond.

Defendant contends the West Virginia court knew he could not afford a $1.1 million bond and, thus, violated his constitutional right to due process and equal protection by dismissing his appeal for lack of funds. Defendant relies on the following passage from a United States Supreme Court opinion: "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established,

these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. [Citations.] We may assume that a State can validly provide for recoupment of the cost of appeals from those who later become financially able to pay. But any such provision must, under the Equal Protection Clause, be applied with an even hand." (*Rinaldi v. Yeager* (1966) 384 U.S. 305, 310-311.)

The record does not support defendant's contention that the West Virginia court knew, when it lowered the bond amount, that he lacked sufficient assets to secure a $1.1 million bond. Defendant failed to contest the bond amount or present financial data in his first motion for reconsideration, and yet the court reduced it from $7 million to $1.1 million. In arguing for reconsideration of the initial $7 million bond order, defendant explicitly denied that he was challenging the amount of the bond. Defendant stated: "Plaintiff asserts in his brief that Defendant Leavitt is claiming that the Seven Million Dollar ($7,000,000.00) bond ordered by this Court is too much. Defendant's actual position is that there is no authority requiring any party, Defendant Leavitt, or any other appellant, to post a bond for the right to pursue an appeal, where no stay of execution on a judgment is in effect. Thus, the fundamental issue raised is the lack of any authority requiring the bond set by this Court."

In addition, defendant's attorney told the West Virginia trial court that defendant could provide a $2 million supersedeas bond. Although defendant later filed a declaration (in support of his second motion for reconsideration of the appeal bond order) stating he had not authorized his attorney to make that statement and that

his assets were less than $1 million, the weight to be given his declaration is not for us to decide.

The remaining points raised by defendant fail to establish either a lack of jurisdiction or a public policy reason for denying full faith and credit to the West Virginia judgment.[15] Even assuming, as defendant alleges, California does not recognize the tort of intentional interference with parental relations, and California law did not require plaintiff to be informed of the adoption placement, that does not make defendant's actions lawful, moral, or just. Lying under oath at his deposition, allowing the adoptive parents to file a false affidavit, and helping Conaty finalize an adoption despite the temporary injunction[16] and paternity judgment constituted such

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[15] Defendant contends in his respondent's brief, apparently for the first time, that the appeal bond order violated the Commerce Clause. According to defendant, the order requiring him as the lone, non-resident defendant to post a bond to maintain his appeal when he was not seeking a stay, constituted an impermissible burden on interstate commerce. We conclude the issue is not property before us.

[16] In his respondent's brief on appeal, defendant conceded the West Virginia jury "held [him] liable for fraud apparently based on his refusal to reveal the whereabouts of the baby and refusal to comply with the injunction entered by the West Virginia trial court in the inverse paternity action. . . ." Defendant qualified this concession by claiming he "was not a party to the inverse paternity action, was not named in the injunction, was not within the jurisdiction of the court entering the injunction, and was not served with the inverse paternity complaint or injunction until *after* Anne [Conaty]'s baby had been placed for adoption." Defendant, having been afforded a full and fair opportunity to litigate those claims in the West Virginia trial, may not relitigate them here.

immoral, reprehensible, and dishonest behavior that we can perceive no reason why California would have a public policy precluding recovery based on these egregious facts. We reject defendant's description of the West Virginia judgment as an unjust punishment for protecting confidences held to be privileged by a California trial court. Without deciding whether the privilege applies, we note defendant was responsible for affirmative misrepresentations that went far beyond simply asserting the attorney-client privilege.

In any event, it does not matter whether this State recognizes the tort of interference with parental relations. "[A] valid judgment will be enforced in another state 'even though the strong public policy of the latter [enforcing] State would have precluded recovery in its courts on the original claim.' [Citation.]" (*Tyus v. Tyus* (1984) 160 Cal.App.3d 789, 793.) "California law is clear that the differing public policy or laws of the enforcing state cannot contravene the full faith and credit clause of the Constitution. As has been repeatedly stated, California must, regardless of policy objections, recognize the judgment of another state as res judicata, and this is so even though the action or proceeding which resulted in the judgment could not have been brought under the law or policy of California. [Citations.] This is in harmony with Restatement Second of Conflict of Laws, section 117, which sets forth that: 'A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State *even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim.*' (Italics added.)" (*World Wide Imports, Inc. v. Bartel, supra,* 145 Cal.App.3d at p. 1011.)

We conclude the order vacating the West Virginia judgment must be reversed and the judgment reinstated. Because the demurrer in the fraudulent conveyance action was sustained solely as a result of the erroneous order vacating the West Virginia judgment, we reverse the ruling on demurrer and judgment of dismissal for the reasons stated above.

DISPOSITION

In No. B108792, the order granting the motion to vacate the judgment is reversed and the judgment is reinstated. In No. B110750, the judgment of dismissal and order sustaining the demurrer without leave to amend are reversed. Plaintiff is awarded costs on appeal.

CERTIFIED FOR PUBLICATION.

ORTEGA, Acting P.J.

We concur:

MASTERSON, J.
DUNN, J.*

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*Assigned by the Chairman of the Judicial Council.